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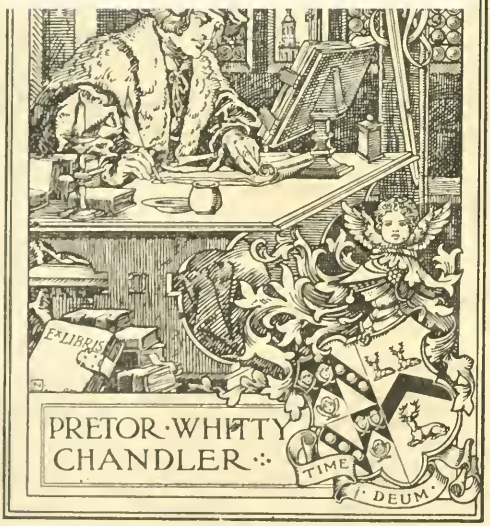

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OF LINCOLN'S INN, ONE OF HER MAJESTY'S COUNSEL,

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W. R. SHELDON,
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PREFACE

TO THE SECOND EDITION.

The lapse of eighteen years, with the usual accompaniment of decided Cases and Statutes, has rendered the labour of preparing a Second Edition somewhat great; and as the work has necessarily been done at various intervals during several years, I feel conscious that it is only too probable that errors may have crept in. I can but submit the result to the Profession, in the hope that it will be as kindly received as the First Edition. It has been, of course, necessary to deal, to some extent, with the Conveyancing Acts, the Settled Land Acts, and the Married Women's Property Act, but they are introduced only so far as they bear on the subject-matter of the book. I do not profess to have attempted to write a treatise on these Acts.

I wish to express the warmest acknowledgment of gratitude to my friend, Mr. W. R. Sheldon, for his untiring assistance; without his industry and energy the delay in publishing this Second Edition would have been even greater than it is. I must

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also do myself the pleasure of acknowledging the assistance that I received in the chapter on Creation of Powers from my late friend and former pupil, Mr. H. R. Webbe, whose untimely death deprived the Bar of a most promising member, and his friends of one endeared to all by his unselfish and lovable nature.

I have also to thank my friend and former pupil, Mr. G. B. Hamilton, of Lincoln's Inn, for his labour in preparing the Index.

G. F.

Lincoln's Inn,
February, 1893.

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A CONCISE TREATISE ON POWERS.

CHAPTER I.

POWERS.

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1. A POWER is an authority reserved by, or limited to, a person to dispose, either wholly or partially, of real or personal property, either for his own benefit or for that of others (Chance, pl. 1; and see *Freme* v. *Clement*, 18 Ch. D. 499). The word is used as a technical term, and is distinct from the dominion which a man has over his own estate by virtue of ownership. Definition of a power.

Powers are either Common Law Powers, Equitable Powers, or derive their efficacy from the Statute of Uses. These names are retained on the ground that they have been sanctioned by user, although they are not perhaps strictly accurate. Common Law Powers are authorities given to one person by another to do an act for him: they may be bare authorities, or powers coupled with an interest. A Common Law Power enables the donee to pass the legal estate; but it is the execution, not the creation of the power, which effects the transmutation of estate. The legal Division of powers. Common law powers.

estate before the execution remains in the creator of the power, or his grantee, or heir-at-law, as the case may be. Thus, a devise by A. that his executors do sell his lands, gives the executors a power to pass the legal estate to the purchaser; the executors themselves take no estate—that descends to the heir-at-law until the power is executed—but they have the power of nominating the purchaser as the person to take the legal estate, and on their doing so, the estate at once vests in him in the same way as if the testator had named him as his devisee (*E. of Stafford* v. *Buckley*, 2 Ves. sen. 179; *Warneford* v. *Thompson*, 3 Ves. 513; *Smith* v. *Lord Camelford*, 2 Ves. 698). Powers of attorney and powers created by Act of Parliament are also instances of Common Law Powers (Sug. Pow. 45). It must of course be borne in mind that, by the common law, estates can only be limited in possession, or by way of remainder or reversion, to take effect on the natural determination of the preceding estate. The grantor in a common law conveyance cannot reserve to himself nor confer on any other person the power of revoking or altering the grant by any future act or instrument, for that is deemed repugnant to the conveyance itself (Co. Litt. 237 *a*).

What estates can be created thereunder.

Equitable powers.

Equitable Powers are such as affect the equitable, not the legal, estate or interest: *i.e.*, where the legal interest is properly vested in one or more, but a power of disposing of the beneficial interest is in some other person. The legal interest does not pass by the execution of the power, but the legal owner must transfer it in order to complete the title of the nominee of the person who executes the power, and equity will compel such transfer (*Re Brown*, 32 Ch. D. at p. 601). The power of selling real estate, vested by implication in executors by a charge of debts before 22 & 23 Vict. c. 35 (*post*, p. 81), is an instance of an equitable power. So, too, is the ordinary power of appointment among children in a marriage settlement where personalty is vested in trustees.

Powers operating under the Statute of Uses.

Powers operating under the Statute of Uses are powers of revoking existing or declaring future uses, vested in some person named for that purpose in the deed by which the uses to be

affected by the operation of the power are created. It has been already observed that, before the statute, legal estates could only be limited in possession, or by way of remainder or reversion to take effect on the natural determination of the preceding estate of freehold. Shifting and springing estates were repugnant to the simplicity of the common law, but, even before the statute, were enforceable in equity; the estate of *cestui que use* being equivalent to the estate now enjoyed by *cestui que trust*. The statute enacted in effect that the seisin should follow the use; that is, that the legal estate should, by force of the mere declaration of the use, pass to the *cestui que use*. This was restrained to the first use by the decision of the common law judges, that there can be no use upon an use. Therefore, in a conveyance to A. to the use of B. to the use of C., the statute executes the use in B., and C.'s estate is merely equitable.

One effect of the statute has been to enable the creation of shifting, future, and springing uses, limited to take effect on the occurrence of certain events or the nomination of certain persons. The ordinary limitation in a marriage settlement to the use of the settlor until the marriage, and from and after the solemnization thereof to the use of trustees, is an instance of a shifting use to arise on the occurrence of an event; and the powers of sale, jointuring, and the like, usually inserted in such settlements, are instances of future uses to arise on the nomination of a person. A power operating under the statute is, then, the capacity thus given to call legal estates into existence in the future; (see Sug. Pow. ch. 1).

In what deeds powers under the statute may be inserted.

2. The last-mentioned powers cannot be inserted in deeds of all kinds, so as to affect the legal estate.

Deeds operating by transmutation of possession, and deeds not so operating.

Conveyances of real estate under the statute may, or may not, operate by transmutation of possession. Where land is conveyed by a common law assurance to A. in fee, the legal seisin is transferred, and vests in him by the conveyance by the common law; and if the grantor declares that such conveyance shall enure to certain uses, those uses will immediately arise, and be executed out of the seisin of A., and the statute transfers the legal estate to those *cestuis que use*. But if the deed be not such

as to operate by transmutation of possession; that is, if it derive its effect from the Statute of Uses and merely transfer the use, there can be no further valid legal use than that of the first *cestui que use*. Thus, if A. bargain and sell by deed enrolled under the statute, to B. and his heirs, there is no conveyance at common law; but, by the operation of the statute, the legal estate at once vests in B.; that being done, the statute is powerless to raise any further uses, for an use cannot be raised upon an use. It follows, therefore, that powers deriving their effect from the Statute of Uses can only take effect on the legal estate, when inserted in deeds operating by transmutation of possession; that is, in declarations of uses of fines and recoveries, feoffments to uses, releases and grants, and not in a bargain and sale, or covenant to stand seised.

In what deeds inserted.

Consideration required to raise uses.

The question of the consideration required to raise uses in bargains and sales and covenants to stand seised is of little practical importance in the present day. See on this subject, with reference to powers inserted in assurances of that nature, Sug. Pow. 138; The Law Magazine and Review, N.S. (1874) vol. 3, p. 1054; Chance, pl. 50 *et seq.;* 3 Sweet's Bythewood, 239, 248, 676.

Demise will not support appointment of the fee.

A power to appoint the legal fee cannot be engrafted on a mere demise. Such a power, in order to be effectual at law, requires a seisin out of which the use appointed thereunder is to take effect. A lessor could not by demise limit the legal fee; and it follows that he cannot by that instrument enable his nominee to do so. Such a power may be good in equity, but can have no effect on the legal estate (5 Sweet's Bythewood, 593, note); and in this respect the Judicature Acts have made no alteration.

Limitation unto and to the use of A.

3. In connection with the doctrine that an use cannot be limited upon an use, the effect of a limitation unto and to the use of A. may be considered.

The statute says that "where any person or persons stand or be seised, &c., to the use, confidence, or trust of any *other* person or persons," &c. Therefore, if an use be limited to a feoffee, conusee, recoveror, or releasee, such use, generally speaking, is

not executed by the statute, but the feoffee, &c., is in by the common law (*Meredith* v. *Joans*, Cro. Car. 244). In this case, notwithstanding the grantee is in by the common law, yet after the declaration of the use to him, he has not only a seisin but an use, although not the use which the statute requires; and, therefore, that seisin which, before the limitation of the use to himself, was open to serve uses declared to a third person, is by the limitation filled up, and will not admit of any other use being limited on it, upon the principle that an use cannot be limited upon an use (Sanders on Uses, 5th ed. 89). "He is in of the estate clothed with the use, which is not extinguished but remains in him; he is, in fact, in both of the estate and the use, both by the common law and by the statute" (*D.* v. *Passingham*, 6 B. & C. 305). Accordingly, in that case, the estates which followed a conveyance unto and to the use of A. were held to be equitable. But that was to effectuate the intention; and it is to be observed that he is primarily in by the common law, although the statute operates so far that no further uses can be declared. That he is in by the statute appears on several authorities. Thus, a conveyance to A. to the use of B. and his heirs gives B. an estate during A.'s life only, for *cestui que use* cannot have an estate in the use of greater extent than the seisin out of which it is raised; but a conveyance to A. to the use of A. and his heirs gives A. the fee (*Meredith* v. *Joans*, Cro. Car. 244). And Lord Bacon (Uses, 65), says, "The whole scope of the statute was to remit the common law, and never to intermeddle where the common law executed an estate; therefore the statute ought to be expounded that where the party seised to the use and the *cestui que use* is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law."

In *Orme's case* (L. R. 8 C. P. 281), A., seised in fee, granted "unto B., C., and D., and their heirs, one perpetual yearly rent-charge of £9," "to hold the said rent-charge unto the said B., C., and D., their heirs and assigns, to the use of the said B., C., and D., their heirs and assigns for ever, as tenants in common,

and in equal shares." It was held that the use being specific, and not inconsistent with the rest of the habendum, the whole habendum must be read as specific, and so read that the deed operated as a grant at common law, and not under the Statute of Uses. In *Heelis* v. *Blain* (18 C. B. (N. S.) 90; 34 L. J. C. P. 88), the grant was to B. and his heirs, habendum to B. and his heirs to the use of A., B., C., D., E., and F., their heirs and assigns, as tenants in common. That was held to operate under the statute. (And see *Lowcock* v. *Overseers of Broughton*, 51 L. T. 399; Sug. Pow. 141-2.) It has accordingly been contended that, if an estate be limited unto and to the use of A. and his heirs by way of mortgage, a power of leasing limited thereupon to A. is invalid at law, because A. is in by the common law (1 Sand. on Uses, 157). Lord St. Leonards (Pow. 140) maintains the contrary opinion. In order to avoid the question, the draftsman should follow the advice given in Bythewood's Conveyancing, and limit the estate in such a case to a seisinee to uses (5 Sweet's ed. 559, note).

Devise to uses.

4. A devise to uses operates by virtue of the Statutes of Wills, concurrently with the Statute of Uses; not on the ground that the Statute of Uses directly applies to wills—for that statute was passed before the Statute of Devises (32 Hen. VIII. c. 1)—but on the ground that a testator, by devising to uses, shows an intention that the rules, made applicable to settlements by the Statute of Uses, shall be applied to his will (*Baker* v. *White*, 20 Eq. 166, 171; *Re Tanqueray-Willaume*, 20 Ch. D. 465, 478; *Cunliffe* v. *Brancker*, 3 Ch. D. 393; *Berry* v. *Berry*, 7 Ch. D. 657), and accordingly a devise to A. and his heirs to the use of B. and his heirs, vests the legal estate in B.; and on the other hand, a devise to the use of A. and his heirs in trust for B. vests the legal estate in A. And it may now be considered to be settled that a devise to uses is good without a seisin to serve those uses (Sug. Pow. 146-8; 2 Jarm. on Wills, 4th ed. 289); and that, although no seisin has been raised by a devise (*e.g.*, if A. devise that B. sell his lands), yet B., in exercising his power, may create a seisin to serve uses, for such must have been the intention of the testator (Sug. Pow. 198).

5. Lord St. Leonards (Pow. 137) says that powers of appointment or revocation may be reserved either in the body of the deed or by indorsement before the execution of the deed, or by a deed of even date; and that there need not be any counterpart of the deed. The cases cited by him (*Griffin* v. *Stanhope*, Cro. Jac. 454; *Outon* v. *Weeks*, 2 Keb. 809; *Fitz* v. *Smalbrook*, 1 Keb. 134) do not appear to have actually decided these points. Lord St. Leonards adds that an interlined power will be good, in the absence of evidence to show that it was made after the execution. But this must be understood to refer to deeds, and not to wills: it is well settled that alterations in a deed are presumed to have been made before, but in a will after its execution, in the absence of evidence to the contrary (Taylor on Evidence, 8th ed. pl. 164). Mode of reservation of powers.

6. Powers may be either general or limited. General powers are such as the donee can exercise in favour of such person or persons as he pleases. Limited powers are such as the donee can exercise only in favour of certain specified persons or classes. A power to appoint by will only is a general power within s. 27 of the Wills Act (*Hawthorn* v. *Shedden*, 3 Sm. & G. 293; *Re Powell*, 18 W. R. 228); and so is a power to direct by will that a sum of money be raised and paid (*Re Jones, Greene* v. *Gordon*, 34 Ch. D. 65). A power to appoint to whom the donee pleases, except A., has been held to be a general power so as to make the appointed fund assets for payment of debts (*Edie* v. *Babington*, 3 Ir. Ch. R. 568), but not to be a general power within sect. 27 of the Wills Act (*Re Byron, Williams* v. *Mitchell*, 1891, 3 Ch. 474); such a power is an absolute power within 36 Geo. III. c. 52 (*Drake* v. *Att.-Gen.*, 10 Cl. & Fin. 257). In *Bristow* v. *Skirrow* (No. 1) (27 Beav. 585), a testator devised his estates on the same trusts as his wife should declare with respect to the disposition of her residuary estate. The wife by her will gave the devised estate to A. and her residue to B., C., and D. The power was held to be general, and A. was held to be entitled; but see *S. C.* 10 Eq. 1. The postponement of the period of distribution of a fund, over which a power of appointing to whom the donee pleases is given, does not prevent the power from being General and limited powers.

general (*Re Keown*, 1 I. R. Eq. 372); and by a revocation of all bequests "in favour of" A., a limited power of appointment, as well as a less interest in A., were held to be revoked (*Re Brough, Currey* v. *Brough*, 38 Ch. D. 456). A power to appoint by will, specially referring to the power, or before a particular time, is not a general power within sect. 27 of the Wills Act (see *Phillips* v. *Cayley*, 43 Ch. D. 222; *Davies* v. *Davies*, 1892, 3 Ch. 63, and *post*, p. 233).

The donee of a general power may appoint to himself (*Irwin* v. *Farrer*, 19 Ves. 86); or to his own executors and administrators (*Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559).

Appointment by donee to himself or by wife to husband.

A husband or wife, donee of a general power, or of a limited power of which the other is an object, may appoint to that other (*Hughes* v. *Wells*, 9 Hare, 749; *Holder* v. *Preston*, 2 Wils. 400). If the appointment be by the wife in her husband's favour, the Court will look with some jealousy on it; but such an appointment will be considered good, unless it is shown to have been made under circumstances sufficient to invalidate it; and the *onus probandi* is on the person impeaching the appointment (*Nedby* v. *Nedby*, 5 De G. & Sm. 377). It has been held at law, however, that a married woman cannot, under a power of leasing, demise to her husband (*D. d. Hartridge* v. *Gilbert*, 5 Q. B. 423. See now Conveyancing Act, 1881, sect. 50; M. W. P. Act, 1882). A power to lease to such person or persons as A. shall think fit, authorizes a lease to a corporation (*Re Jeffcock*, 51 L. J. Ch. 507).

Division of powers over real estate.

7. Powers over real estate are either (1) powers of ownership; (2) powers collateral; or (3) powers relating to the estate of the donee of the power in the land; and these last are subdivided into powers appendant and powers in gross.

Powers of ownership.

A power of ownership is one which gives the donee complete dominion over the estate, although he has no estate in it. Thus a limitation to such uses as A. shall appoint, and, in default of appointment to B., gives A. a power of ownership.

Powers collateral.

A collateral power is a bare power given to a mere stranger who has no interest in the land: *e.g.*, a power of sale and exchange given to trustees who have no estate in the settled lands. "A power collateral is of the nature of an authority to

deal with an estate, no interest in which is vested in the donee of the power. A power of that kind is wholly different from an estate or interest, and cannot without abuse of language be so designated" (*Dickenson* v. *Teasdale*, 1 D. J. & S. 60).

Powers relating to estate of donee in the land.

A power relating to the estate of the donee in the land is a power given to some person having an estate or interest in the land over which it is to be exercised. Such a power is, as above stated, either appendant or in gross (see *per* Jessel, M. R., in *Re D'Angibau*, 15 Ch. D. at p. 232).

Appendant.

It is appendant when the estate created by its exercise overreaches and affects the estate and interest of the donee of the power.

In gross.

It is in gross when the estate so created is beyond, and does not affect the estate or interest of such donee. Thus, a power of jointuring given to a tenant for life is in gross; and so is a power to appoint the estate in remainder amongst his own children, given to the tenant for life. But a power of leasing in possession in the same person is appendant (see Butler's note to Co. Litt. 342 *b*). A power to appoint by will real estate, of which the donee was equitable tenant for life for her separate use, with remainder in default of appointment in trust for her own right heirs, has been held to be appendant (*Penne* v. *Peacock*, Forrester, 41).

The distinction is chiefly important with respect to the extinguishment and suspension of powers.

Powers and trusts distinguished.

8. Powers, properly so called, must be distinguished from trusts. "Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party intrusted" (*per* Wilmot, C. J., Wilmot, 23). Trusts and powers are, however, often so blended that it becomes a question of nicety to determine whether they are in fact powers or trusts; and the cases have established an intermediate class, which may be termed powers in the nature of trusts (see *post*, chap. xii.).

The question is often important in cases of conversion. To effect conversion an imperative trust is necessary; a discretionary

power, unless exercised, is not sufficient (*Fletcher* v. *Ashburner*, 1 Wh. & T. L. C., and cases there cited).

It is a question of construction in each case (*Re Hotchkys*, 32 Ch. D. 408); and no general rule can be laid down (see *Griereson* v. *Kirsopp*, 2 Keen, 653); but it is apprehended that the word "direct" is mandatory. And, generally, it is probable that the Court would hold the same words imperative for the purposes of conversion as have been held imperative in cases of precatory trusts, as to which, see *post*, chap. xii.

CHAPTER II.

EXTINGUISHMENT AND SUSPENSION OF POWERS.

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1. Before the 1st of January, 1882, a power simply collateral could not be extinguished or suspended by any act of the donee, or of any other persons; nor could it be released, where it was to be exercised for the benefit of another (*West* v. *Berney*, 1 R. & M. 434; *Willis* v. *Shorral*, 1 Atk. 474; *Digge's case*, Sug. Pow. 893). Collateral powers could not be extinguished or released.

Such a power is not in the nature of a right or interest in the donee thereof; and is given, or supposed to have been given, for the benefit of some third person (Co. Litt. 265 b). It is now enacted by the Conveyancing Act, 1881, s. 52, as follows: (1.) A person to whom any power, whether coupled with an interest or not, is given, may by deed release or contract not to exercise the power. (2.) This section applies to powers created by Conveyancing Act, 1881, s. 52.

instruments coming into operation either before or after the commencement of the Act. It is apprehended that this Act does not apply where the release of the power would be a breach of trust, but that a power coupled with a duty cannot be released, nor, if it be to arise at some future time, can the donee fetter his right to exercise it by any act or undertaking previous to that time (*Re Eyre*, 49 L. T. 259; *Saul* v. *Pattinson*, 34 W. R. 561).

In *Weller* v. *Ker* (L. R. 1 Sc. & D. 11), by a testamentary trust settlement, varied by a subsequent codicil, A. directed trustees to hold his estate to the use of B. in tail, with remainders over, and directed that the estate should be conveyed to B. on his attaining 25; but declared that "in case B. should marry or otherwise conduct himself so as not to merit the approbation of his said trustees," his estate should be a mere life estate, with remainder to his children in fee. B. attaining 21, and before attaining 25, married with the approbation of the trustees: they were aware of the settlements by which (amongst other things) B. charged the said estate with a jointure for his wife, which he could only do in the event of the estate being conveyed to him in fee or in tail. B. subsequently misconducted himself. The approval of the trustees and their knowledge of the settlement, and the fact that they gave no warning that they might ultimately be obliged to defeat it, made no difference in the duties of the trustees: they were held bound to execute the power so as to cut down B.'s estate to a life interest, although the effect was to defeat the provision for the wife, as well as other claims founded on a confident expectation that the marriage settlement would not be disturbed.

In *Re Dunne's Trusts* (L. R. 1 Ir. 516) the testator gave his residue to his children in certain proportions, subject as to the share of his son M. as thereinafter provided. The sons were to take a vested interest in their shares at 23, subject again as to M.'s share as thereinafter provided. And as to M.'s share he empowered his wife in her uncontrolled discretion by deed or will to declare that he should not take more than £1,000 for his share; and in the event of his wife exercising that power, he gave the residue of M.'s share over to his other children. After

M. had attained 23 the wife released her power and covenanted with him not to execute it. The trustees paid M.'s share into Court, but on M. petitioning for payment out, the M. R. held that the power of the widow was "an authority vested in her as a trustee, to be exercised not for her own benefit, but for the benefit of the children of the testator who gave it"; and therefore could not be released.

The indestructible nature of a power coupled with a trust of this nature does not depend on any technical rule of tenure, but is a rule of equity applicable as well to personal as to real estate (see *Chambers* v. *Smith*, 3 App. Ca. 795; *Thacker* v. *Key*, 8 Eq. 408). By sect. 6 of the Conveyancing Act, 1882, (1) a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power; (2) on such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power; (3) the section applies to powers created by instruments coming into operation either before or after the commencement of the Act. Conveyancing Act, 1882, s. 6.

Although, before the 1st of January, 1882, a collateral power could not be released, there were cases in which, if it was an equitable power, equity interfered to prevent its execution. In *Hodkinson* v. *Quinn* (1 J. & H. 303), a testator, after charging his estate with payment of his debts, devised certain lands to trustees on trusts for his daughters and their families, and after the death of the surviving daughter, to sell, with power to give receipts. The executors took a power of sale for payment of debts, and could have insisted on a conveyance of the legal estate. The V.-C. held that the reasonable construction of the particular will was, that as soon as the time came when the trustees were to exercise their power, and they did exercise it accordingly, the first power ceased. He also said that generally any sale by trustees under a power, prior to an actual sale by executors, would be effectual: and that in his opinion the authorities had not gone the length of establishing that after an Equitable release or extinction.

actual alienation by devisees, the executors could still sell. Mr. Dart (V. & P. 697 *et seq.*, 6th ed.) points out the difficulty before 22 & 23 Vict. c. 35, ss. 14-18, of accepting titles depending on wills which contain charges of debts and devises of the estates to other persons beneficially. He says that it had been the practice to accept titles from the devisee alone, without requiring evidence of the debts having been paid or causing the executors to concur in the conveyance. Recent decisions, however, had tended to raise a very serious question as to whether this practice had not been erroneous, and as to whether the sale should not have been by the executors, or at any rate with their concurrence: even the efficacy of their concurrence had been doubted by many practitioners, upon the ground that the power of the executors to sell, if it existed, was a collateral power, and incapable of being released.

The implied power of executors to sell real estate before the statute was merely an equitable power: the question, so far as cases of that kind are concerned, would generally be one of equities: and it seems that after a *bonâ fide* sale by a devisee, the Court would not give effect to any attempted sale by executors (*Hodkinson* v. *Quinn*, 1 J. & H. 303; *Storry* v. *Walsh*, 18 B. 559): the difficulty would be to decide whether the equity of the purchaser for value is better than that of the creditors, whose claims could not be affected by any release or laches on the part of the executors: if, however, the purchaser gets the legal estate, it seems the better opinion that the Court would not interfere to deprive him of it. Mr. Dart (699) says that in cases not within 22 & 23 Vict. c. 35, it will still be a wise precaution for a purchaser from a devisee to satisfy himself that all the debts have been paid, or to require the executors to authorize the proposed payment of the purchase-money to the vendors; and, if the power be one that authorizes the disposition of the legal estate, the sale should be made by the executors—as if a devise be that a man shall sell certain land and the person authorized levies a fine, or executes a feoffment, or releases all his right, yet he may afterwards sell the land (Sug. Pow. 49, citing

Digge's case) ; and the donee of such a power could not disclaim before the Conveyancing Acts (Sug. Pow. 50 ; and see Co. Litt. 342 b, Butler's note iii.).

2. Before the 1st of January, 1882, all powers, other than powers collateral and powers coupled with a trust or duty, and since the 1st of January, 1882, all powers, other than powers coupled with a trust or duty, may be suspended or destroyed, either wholly or in part, by the donees thereof (Sug. Pow. 82 ; Conveyancing Act, 1882, s. 6).

All powers, except collateral and coupled with a trust, may be suspended or destroyed.

"There is a diversity between such powers or authorities as are only to the use of a stranger and nothing for the benefit of him that made the release, and a power or authority which respecteth the benefit of the releasor, as in the usual powers of revocation ; when the feoffee, &c., hath a power to alter, change, determine, or revoke the uses (being intended for his benefit) he may release : and where the estates were before defeasible, he may, by his release, make them absolute and seclude himself from any alteration or revocation" (Co. Litt. 265 b).

Every power reserved by the grantor for his own benefit, whether he has reserved an estate in the land or not, is an interest which may be released (*Bird* v. *Christopher*, Stiles, 389).

Rule applies to present and future powers ;

The rule applies as well where the power is present as where it is future, and to arise upon a contingency (*Albany's case*, 1 Co. Rep. 110 b) ; and to personal as well as to real estate (*Noel* v. *Henley*, McCl. & Y. 302) ; and it is submitted that it applies to all cases, whether the donee be the settlor of the estate or not.

to powers appendant and in gross ;

The rule applies to powers appendant and in gross. "I think that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate : and his dealing with the estate, so

as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is that it is not permitted to a man to defeat his own grant" (*per* Sir John Leach, *West* v. *Berney*, 1 R. & M. 431, 435. The proposition, however, that the power is extinguished, must be taken subject to the qualification stated in the next rule, *post*, p. 20). Thus where there is a general power of appointment, with remainder to the use of the donee in fee, a grant of the fee extinguishes the power.

to limited powers;

The rule applies to limited powers, *e.g.*, powers in favour of a wife or children. Such powers cannot be called trusts, for the alleged *cestuis que trust* cannot compel their execution; and as it is at the option of the donee to exercise it or not, any dealing with the estate inconsistent with its exercise must determine the option (*Smith* v. *Death*, 5 Madd. 371; *King* v. *Melling*, 1 Vent. 225; *Coffin* v. *Cooper*, 2 Dr. & Sm. 365; *Bickley* v. *Guest*, 1 R. & M. 440); and the release, if once made, is absolute and irrevocable. In *Smith* v. *Plummer* (17 L. J. Ch. 145), real estate was settled by a marriage settlement in 1807 on husband and wife successively for life, and after their deaths to their children as they should by deed jointly appoint, and in default of such appointment, as the survivor should by deed or will appoint. The wife died without having joined in any appointment, and in 1842 the husband released his power by deed, and in 1843 made a will purporting to exercise the power. The V.-C. held that the release was valid and the will inoperative as an exercise of the power.

to testamentary powers.

The rule applies to powers exerciseable by will only, as well as to those exerciseable by deed, or by deed or will (*Barton* v. *Briscoe*, Jac. 603; *Horner* v. *Swann*, T. & R. 430; *Re Chambers*, 11 Ir. Eq. R. 518; and see *Palmer* v. *Locke*, 15 Ch. D. 294; *Re Radcliffe*, *Radcliffe* v. *Bewes*, 1892, 1 Ch. 227).

Extinguishment by dealings inconsistent with exercise;

The powers to which the rule refers may be affected either by dealings inconsistent with their exercise or by express or implied release. A covenant or agreement not to execute a power operates, in equity, either entirely or *pro tanto*, as the case may be, as a release of the power (*Hurst* v. *Hurst*, 16 B. 372;

Davies v. *Huguenin*, 1 H. & M. 730). And a covenant may have this effect, although it is merely voluntary (*Isaac* v. *Hughes*, 9 Eq. 191; *Green* v. *Green*, 2 Jo. & L. 529; *Re Chambers*, 11 Ir. Eq. R. 518).

by express words or by implication.

These powers may be released, extinguished, or suspended by express words (*Cunnynghame* v. *Thurlow*, 1 R. & M. 436 n.; *Smith* v. *Houblon*, 26 B. 482), or by implication. But although a recital may amount to an agreement to release, yet the whole scope and intent of the deed is to be considered (*Boyd* v. *Petrie*, 7 Ch. 385). The concurrence of the mortgagor in the transfer of a mortgage, with the benefit of all provisoes, &c., and his covenant to pay a different sum on a different occasion, does not destroy the power of sale contained in the original mortgage deed (*Young* v. *Roberts*, 15 B. 558). But if there were no assignment of the powers and provisoes contained in the first mortgage, it would be evidence of an intention that they should be extinguished (*ibid.*; *Curling* v. *Shuttleworth*, 6 Bing. 121; *Cruse* v. *Nowell*, 2 Jur. N. S. 536, which was a case of sub-mortgage, and a sale by sub-mortgagor to sub-mortgagee; *Stewart* v. *Lord Donegal*, 2 Jo. & L. 636). So, too, on a disentailing deed, the powers of sale, &c., in the original settlement may be kept alive (*Re Wright*, 28 Ch. D. 93; *Harrison* v. *Round*, 2 D. M. & G. 190). As to the persons by whom these powers may be released or extinguished, see *post*, Chap. IV.

Fines and recoveries and feoffments.

Fines and recoveries, which are now abolished by 3 & 4 Will. IV. c. 74, and feoffments, which since 8 & 9 Vict. c. 106, s. 4, have no tortious operation, prior to those Acts respectively ransacked the estate, and by their force destroyed powers, vested in the parties levying or suffering them, without reference to their operation in barring estates tail. But deeds acknowledged under the Act for Abolishing Fines and Recoveries have an innocent operation only, and do not destroy powers, except where a like deed, independently of the Act, would have destroyed them (Sug. Pow. 92).

In *Tomlinson* v. *Dighton* (1 P. W. 149), it was admitted that where there was a devisee for life with power to appoint to her children, the power would be extinguished by fine (*Bickley* v.

Guest, 1 R. & M. 440). And in *Saville* v. *Blacket* (1 P. W. 777), it was held that a tenant for 99 years, if he should so long live, extinguished his power to charge the estate with a sum of money, by joining in a recovery and resettlement of the estate.

Release of powers by married women.

Before the abolition of fines and recoveries (3 & 4 Will. IV. c. 74), a married woman could not release or extinguish a power affecting real estate, except by fine or recovery. The 77th section of the Act enabled her to do so by deed acknowledged, with the concurrence of her husband, subject to the qualification imposed by sect. 78 as to property which she was restrained from anticipating; and Malins' Act (20 & 21 Vict. c. 57) enabled her in the same manner to release powers affecting reversionary personal estate, where she was not restrained from anticipation. It is submitted that it was always competent to her to release her power over personalty vested in possession, and that she may now by deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion, and whether she is restrained from anticipation or not, under the provisions of the Conveyancing Act, 1881, sect. 52. The word "person" in the Act includes females as well as males (13 & 14 Vict. c. 21, s. 4); and it appears impossible to say that a married woman is not accurately described as a female person. The Married Women's Property Act, 1882, appears not to touch the question.

Restraint on alienation.

It is submitted that a restraint on anticipation cannot affect the married woman's capacity to release her power; it is difficult to see why a veto on alienation to a limited extent should prevent the release and extinguishment of the capacity of alienation by power so far as permitted.

In *Heath* v. *Wickham* (5 L. R. Ir. 285), under a separation deed lands in Ireland were vested in trustees upon trust to pay the rents to a married woman during her life for her separate use, without power of anticipation, and after her death to the use of such persons as she should appoint by will. The Court of Appeal held that under the Irish Fines and Recoveries Act, sect. 68 (which is the same as sect. 77 of the English Act, with the addition of the word "disclaim"), the married woman could

by deed acknowledged release this power, notwithstanding the restraint on anticipation of her life estate. V.-C. Chatterton had held that the 69th section of the Irish Act, which provides that the powers of disposition given by sect. 68 shall not enable a married woman to dispose of lands or any estate therein where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman, prevented a release of the power under sect. 68. But the Court of Appeal considered that the Act only prevented a married woman from anticipating her own enjoyment of the property subjected to the restraint, and that sect. 69 does not qualify the preceding section, except as to the actual estate or interest which is itself covered by the restriction (see p. 308). It will be observed that the phraseology of the Irish Act differs from that of sect. 78 of the English Act; but Lord Lyndhurst, in *Baggett* v. *Meux* (1 Ph. 628), considered that the two Acts meant the same thing; and that the Irish Act, which is subsequent to the English Act, explained that Act.

In the case before the Irish Court the power was testamentary only; but it is submitted that the same reasoning applies to a power of appointment by deed, *e.g.* the ordinary power of appointment in default of issue in a settlement, by will when covert, by deed or will when discovert. It cannot be said that a release of this power of disposing of the property operates as a disposition in breach of the restraint on anticipation of the life interest; it is the execution of the power, not the release of it, that would operate as an alienation of the estate, and even this would leave untouched the life estate which alone is usually affected by the restraint; (and see *Re Onslow*, *Plowden* v. *Gayford*, 39 Ch. D. 622).

It may here be added that husband and wife are empowered to execute a joint power of appointment, notwithstanding that they are judicially separated (20 & 21 Vict. c. 85, s. 26).

Destruction by alienation of particular estate.

3. Powers appendant are not suspended or destroyed by the alienation of the particular estate to which the power was attached, unless the terms of the instrument creating the power

show that such was the donor's intention. Lord St. Leonards' dictum (Pow. 66) that an alienation of the life estate in all cases prevents the exercise of a power of leasing with the consent of the alienee must be taken as overruled, although there may be cases in which, on the construction of the instrument, it is plain that the donor of the power meant the execution to be confined to the period during which the donee possessed the estate to which it was appendant. It is of course competent to the creator of the power expressly to declare that it shall be exercised by the donee only while he remains in unencumbered possession of the estate to which the power is appendant. But the general rule may be stated as follows:

Generally alienation does not destroy power.

> A power appendant may be exercised, although the estate to which it was appendant be gone, provided only that such exercise does not derogate from the previous grant, whether voluntary or by operation of law, of the donee of the power (*Alexander* v. *Mills*, 6 Ch. 124).

Absolute alienation.

In that case trustees of settled estates had a power of sale, to be exercised at the request and direction of H., the tenant for life, who was also entitled to the ultimate reversion in fee. H. made an absolute conveyance of all his estate and interest for value. It was held that H.'s power to consent was not extinguished by the absolute alienation of his life estate, but could be still exercised with the concurrence of the alienee.

In *Warburton* v. *Farn* (16 Sim. 625) the facts were the same as those in *Alexander* v. *Mills*, the only difference being that the power of consenting to a sale was expressly reserved, and the assent of the purchaser of the life estate thereby made unnecessary.

In *Long* v. *Rankin* (Sug. Pow. 895), tenant for life with power of leasing aliened his life estate by way of security, reserving the right to exercise his leasing power with the consent of the alienees. The House of Lords held that the power could be validly exercised.

In *Holdsworth* v. *Goose* (29 B. 111), a power of consenting to a sale, similar to that in *Alexander* v. *Mills*, was held to be not extinguished by the bankruptcy of the tenant for life, but that a good title could be made with the assent of the bankrupt and his assignees. Bankruptcy.

In *Eisdell* v. *Hammersley* (31 B. 255), the decision went a step farther, for the assignees in bankruptcy had sold the life interest, and it was held that, with the consent of the persons in whom such life interest had vested, a good title could be made; (and see *Simpson* v. *Bathurst*, 5 Ch. 193; *Lord Leigh* v. *Ashburton*, 11 B. 470; *Leclère* v. *Beaudry*, L. R. 5 P. C. 363). In *Re Cooper*, *Cooper* v. *Slight* (27 Ch. D. 565), funds were bequeathed to trustees on trust for A. for life, and after his death for B. (an infant), and the trustees had power to advance B. a portion of his share with A.'s consent. A. became bankrupt, and it was held that the powers were not extinguished, but could only be exercised with the consent of the trustee in bankruptcy under the direction of the Court of Bankruptcy.

And as powers appendant are not affected by the absolute alienation of the life estate to which they attach, *à fortiori* they are not affected by a conditional alienation thereof, as by mortgage (*Tyrrell* v. *Marsh*, 3 Bing. 31; *Walmesly* v. *Butterworth*, 5 Sweet's Bythewood, 168). Conditional alienation.

Powers of management are given for the benefit of the inheritance; *e.g.*, that of leasing, as providing the means of keeping the land in a proper state of cultivation; that of sale, as enabling the tenant for life to dispose of outlying property, or of the whole estate, if the circumstances of the family prove unequal to the luxury of a landed property. The security of the remaindermen depends on the conditions and qualifications under which the power is to be executed, and not upon the estate or interest of the person by whom it is to be executed. It appears, therefore, to make no difference whether the power is one of leasing or of sale; in either case it is exerciseable generally after alienation; and a power of appointing new trustees can be exercised by the donee after alienation without the concurrence of the grantee (*Hardaker* v. *Moorhouse*, 26 Ch. Powers of management.

D. 417). It may here be added that the statutory powers given to a tenant for life by the Settled Land Act are not capable of assignment or release, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement, but without prejudice to the rights of the assignees for value of the tenant for life (S. L. A. 1882, s. 50).

Powers of appointment governed by same principles.

4. The powers in the cases cited in the foregoing paragraph were powers of management; *e.g.*, sale and leasing. The same principles apply to powers of appointment, whether general or special. The donee cannot affect any prior alienation of his own estate, whether by his own act or by law; but his power remains operative so far as it can divest, or take effect out of, any estate other than the estate which has been aliened (*Re Sprague*, *Miley* v. *Cape*, 43 L. T. 236).

In *Doe* v. *Britain* (2 B. & Ald. 93), lands stood limited to the usual uses to bar dower in favour of A., the ultimate use being to A. and his heirs. A. committed an act of bankruptcy on which he was afterwards declared bankrupt, and then executed his power in favour of the defendant, who had notice of his bankruptcy. The Court held that the assignees in the bankruptcy could recover in ejectment against the appointee, and that the power was gone. It would probably now be held in a similar case that the power was not extinguished, but could not be exercised by the bankrupt in derogation of the estate which had passed out of him on the bankruptcy; and there seems to be no reason why under the present law the trustee should not exercise the power; (see Bankruptcy Act, 1883, s. 44, subs. 2 (ii.)).

In *Jones* v. *Winwood* (10 Sim. 150), an estate was settled to such uses as A. and his wife should jointly appoint, and in default, to the use of A. for life, with remainder to the use of his wife for life, with remainder to the use of the sons of A. successively in tail, with remainder to the use of the daughters of A. as tenants in common in tail, with remainder to the use of A. and his heirs. In 1824, A. conveyed all his estate to his provisional assignee under the Insolvent Debtors Act; and in

1828 joined with his wife in appointing under their joint power to trustees in fee in trust for sale. A suit for specific performance of a contract for sale made by the trustees was commenced, and a case was sent to the Court of Exchequer on two points, viz., (1) whether the power was destroyed by the conveyance to the assignee; and (2), if not, what estate passed under the appointment of 1828. The Court certified that the power was not destroyed, but was well executed so as to convey the estate for life of the wife and the estates tail of the children (p. 156); or, in other words, that the appointment defeated those estates, and the appointees took the estate appointed to them during such time as those estates, if not defeated, would have endured (Sug. Pow. 78). The V.-C. confirmed this certificate, and decreed specific performance.

Badham v. *Mee* overruled.

This case must be taken to have overruled *Badham* v. *Mee* (1 M. & K. 32; 7 Bing. 695). In that case lands stood limited to the use of A. for life, with power to appoint to any one or more of his sons in fee or otherwise, and, in default of appointment, to the use of his first and other sons in tail, with remainder to A. in fee. A. became bankrupt, and subsequently appointed to his eldest son in fee. The Court of Common Pleas and Sir John Leach held the appointment bad, not because the power was extinguished, but because the particular limitations made by the appointment could not have been valid if introduced into the original deed creating the power—a ground which is untenable (see 10 Sim. 163).

In *Hole* v. *Escott* (2 Keen, 444; 4 M. & Cr. 187), lands were limited to the use of the husband, A., for life, with remainder to trustees during the life of A. to preserve contingent remainders, with remainder (subject to a rent-charge and term) to the use of such children of the marriage as husband and wife should jointly appoint, and, in default, as the survivor should appoint; and, in default, to the use of the issue of the marriage living at the death of the survivor; with remainder to the husband in fee. The husband became bankrupt, and subsequently he and his wife appointed. The wife survived her husband, and thereupon the contingent remainders to the

children failed for want of a particular estate to support them. The joint appointment was consequently bad, for the only estates under the settlement which it could operate to divest, or out of which it could take effect, were the life estate and remainder in fee of A., and these had passed to his assignee in bankruptcy, and could not be affected by any subsequent dealing of his.

Acts of person entitled in default immaterial.

It is, of course, clear that a power of appointment is not affected by the bankruptcy of any person entitled in default of appointment; *e. g.*, A.'s power of appointment over property which, in default of appointment, is given to B., cannot be affected by anything that B. can do (*Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Chambers* v. *Smith*, 3 Ap. Ca. 795; and see *Re Vizard*, 1 Ch. 588).

Powers of advancement governed by same principles.

The same principles apply to powers of advancement of personal estate which, although not technically appendant, may nevertheless take effect out of the appointor's life interest. A tenant for life, who has power to direct or consent to advancements to his children during his life of the portions to which they will be entitled after his death, cannot after parting with his life estate direct or consent to an advancement, so as to prejudice his assignee; for that would be to derogate from his own assignment (*Noel* v. *Henley*, M'Cl. & Y. 302; *Nottidge* v. *Green*, 33 L. T. 220; *Cooper* v. *Slight*, 27 Ch. D. 565).

Effect of marriage on such powers.

But it has been held to be otherwise, in the case of a married woman as against her husband and an assignee from herself and her husband. In *Whitmarsh* v. *Robertson* (1 Coll. 570), A. was entitled under a settlement to a life interest in trust funds, not settled to her separate use; and the trustees had power with her consent during her life to advance part of the fund, to which her four children were entitled at her death. A. married without any settlement, and joined with her husband in assigning her life interest. The trustees afterwards advanced part of the fund with A.'s consent; and it was held that the power of advancement was well executed. The correctness of this decision seems open to question. The wife's life interest vested on her marriage in her husband, subject to any equity to a

settlement which she might establish. The ground of the V.-C.'s opinion that she could exercise her power without and against the consent of her husband does not appear. It is true that the marriage did not interfere with the power, but the alienation of her interest caused by the marriage prevented her exercise of it so as to affect that interest.

Effect of alienation by object of such power.

It is submitted that a power of advancement is suspended or destroyed by the mortgage, alienation, or bankruptcy of the object. The power of advancement is merely a power to make, for the benefit of the object, a payment in anticipation of the portion, vested or contingent, of such object in the trust property. If, by reason of events subsequent to the creation of the power, the object thereof cannot become ultimately entitled to any portion of the trust property, it follows that nothing can be paid to him in anticipation of such portion.

Effect of bankruptcy on discretionary power of trustees.

A discretionary power given to trustees to pay or not to pay income to a legatee for life determines by the bankruptcy of the legatee; and the income vests in the trustee in bankruptcy, unless the trustees are authorized to apply or accumulate such part of the income as they do not pay to the legatee for the benefit of third persons (*Piercy* v. *Roberts*, 1 M. & K. 4; *Snowdon* v. *Dales*, 6 Sim. 524). If such power authorizes the trustees to exclude the bankrupt altogether, it is not affected by the bankruptcy; but so much of the property as is actually allocated to the bankrupt vests in the trustee in bankruptcy (*Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Holmes* v. *Penney*, 3 K. & J. 90; *Re Coe*, 4 *ibid.* 199), and cf. *Re Coleman, Henry* v. *Strong*, 39 Ch. D. 443. Where, however, the trustees' power did not authorize them to exclude the bankrupt altogether, the Court has directed an inquiry what is proper to be applied for the benefit of the other objects of the power, and has given the residue to the trustee in bankruptcy (*Wallace* v. *Anderson*, 16 B. 533; *Page* v. *Way*, 3 B. 20; *Kearsley* v. *Woodcock*, 3 Hare, 185; *Carr* v. *Living*, 28 B. 644; but see *contrà*, *Godden* v. *Crowhurst*, 10 Sim. 642, where the V.-C. pointed out that the power did not authorize the exclusion of the bankrupt; see *Re Landon*, 40 L. J. Ch. 370). In *Wallace* v. *Anderson*, above cited, an account was directed what amount

had been properly applied by the trustees; and an account was directed against them on that footing; and see *Re Ashby, Ex parte Wreford* (1892, 1 Q. B. 872). It is submitted, however, that the question is, not whether the power authorizes exclusion or not, but whether the trustees' discretion is absolute or whether a trust is imposed on them which they are bound to execute. Assuming *bona fides*, there seems to be no reason, upon the construction of any of the powers in the above-cited cases, why the trustees should not have appointed a merely illusory share to the bankrupt; and, if so, they need now appoint no share at all (37 & 38 Vict. c. 37). In such a case —*i. e.*, where the power is one of appointment left to the uncontrolled discretion of the donee—the Court cannot interfere. If, however, no discretion or a partial discretion only be given, and a trust created, the Court can, consistently with principle, interfere to execute such trust.

Does the grant of a term of years suspend a power of leasing?

5. Lord St. Leonards (Pow. pp. 54—56) cites the case of *Bringloe* v. *Goodson* (4 Bing. N. C. 726), as establishing "that there is no absolute suspension of a power of leasing by the grant of a term of years out of the estate of the tenant for life; but that, although no right is reserved by the tenant for life to execute his power as between him and his grantee, he may exercise it, and if his life estate is overreached by the exercise of another power in another person, the grant by him shares the same fate, and the lease under his power, and the estate under the other power, operate just as if they had been created in that succession by the creator of the power."

Question whether a power is paramount to an estate tail or not.

6. It is often a question of some difficulty whether a power is or is not paramount to an existing estate tail, and, accordingly, whether it is destroyed or not by a disentailing deed or a recovery.

Such a power is nothing more than a modification of an use. The settlor, instead of declaring the uses himself, directs that another person shall have a power of declaring to what uses the estate shall remain; and when the power is executed, it is the same thing as if the settlor himself had declared the uses. If, therefore, there be a limitation to the use of A. for life, with remainder to B. in tail, and a power of sale be given to trustees with A.'s consent,

the uses to be declared by the trustees on the execution of their power are to be taken as if they had been inserted in the instrument creating the power. If, therefore, B. were to suffer a recovery, or to execute a disentailing assurance without A.'s concurrence, the power of sale would be unaffected thereby (*Roper* v. *Hallifax*, 8 Taunt. 845); the same would be the case if a recovery was suffered or assurance executed, and the power was expressly reserved (*Harrison* v. *Round*, 2 D. M. & G. 190; *Re Wright and Marshall*, 28 Ch. D. 93); or if it was clearly the intention of the parties that it should be reserved (*Hill* v. *Pritchard*, Kay, 394). And so, too, although the whole estate of the donee of the power be conveyed away, if it be by way of resettlement and the prior uses are relimited, and the prior powers of sale and exchange saved and confirmed, although present powers of sale and exchange are reserved by the new settlement to different persons (Sug. Pow. 71).

In the cases of *Roper* v. *Hallifax* and *Hill* v. *Pritchard*, the power was held to be antecedent and paramount to the estate tail. It was to be exercised in both cases with the consent of the tenant for life, and therefore no act of the tenant in tail could bar the power. In the former case the tenant in tail only was vouched; in the latter, the tenant for life joined, but, on the words of the disentailing deed, was held not to have intended to give up her power.

It appears that if any case was to arise in which the power was strictly a mere shifting use, Lord St. Leonards' argument in *Roper* v. *Hallifax* (Sug. Pow. 901) would prevail, and it would be held to be extinguished. For example: if A. were tenant in tail in possession under a settlement which contained a power of sale to trustees, and he acquired the fee by executing a disentailing assurance, the power would be gone, not only on the above ground, but also because (as after stated) a power cannot exist any longer than the purposes for which it was created require.

Powers in gross.

7. A power in gross is independent of the donee's estate, and may be exercised at any time, as well

after as during the continuance of his interest (*Parsons* v. *Parsons*, 9 Mod. 464).

In *Re Dunne's Trusts* (5 L. R. Ir. 76), a testator left the residue of his property to his children in certain proportions, the share of M., one of his sons, to be subject as thereinafter provided; the sons' shares to become vested at 23, subject as aforesaid as to M.'s share. As to M.'s share, the testator empowered his wife in her uncontrolled discretion, by deed or will, to declare that M. should not take more than £1,000 for his share; and, in the event of the exercise of the power, he gave the balance of M.'s share over. After M. had attained 23, his mother exercised the power of reduction; and it was held a good exercise of the power, notwithstanding that the share had become vested.

The same point may also arise with reference to powers of revocation, after portions have become in terms vested. Thus, in *Reresby* v. *Newland* (2 P. W. 93), where there was a term to raise portions, to be paid at the daughters' marriages, with a power for the father, with the consent of the trustees, to revoke all the uses of the settlement; Lord Macclesfield, although not deciding the case on this ground, said (p. 101), "With respect to the power of revocation, it is still a subsisting power, and consequently suspends and prevents the portion from being as yet payable, because the father, by consent of the trustees, may yet revoke; he may revoke at any time before the portion is raised and paid;" (and see *Sleeman* v. *Magrath*, 8 Ir. Ch. R. at p. 207, *per* Blackburne, L. J.).

But the power may be extinguished by necessary implication arising from the words of the instrument by which it is created (Sug. Pow. 79).

When extinguished.

In *Haswell* v. *Haswell* (2 D. F. & J. 456) a fund was settled in trust for the husband for life, or until (amongst other things) insolvency, with remainder to his wife for life, remainder to their children or issue, as the survivor should appoint, and in default, "from and after the several deceases of the husband and wife, *or the sooner determination of the interests thereinbefore*

limited to them respectively, in trust for the children then living, and the issue of deceased children then living, *the shares of such as should have attained* 21 *to be immediately paid and transferred to them*, and the shares of such as should not then have attained the age of 21 years to be immediately paid and transferred to them on attaining that age." The husband's interest ceased through his insolvency, and his wife afterwards died. Lord Campbell (affirming the Master of the Rolls) said that he quite agreed to the position that the husband's power of appointment was not extinguished on his insolvency. It was a power in gross, and could have been exercised at any time, not only while his own interest continued, but while the interest of the wife continued. But he considered there was a clear indication in the settlement that the power in question was to be exercised while the interest of the husband or of the wife continued. He was much struck (apparently) with the question, what was to be done with the fund until appointment? It is submitted that this is an unsatisfactory ground of decision; the case, however, does not profess to limit the generality of the rule above stated, and would probably only be followed under circumstances precisely similar. Lord St. Leonards disapproves of it (Pow. pp. 261-2).

Not extinguished.

In *Wickham* v. *Wing* (2 H. & M. 436) the subject of the power was real estate, and the power had been exercised after the appointor's estate had determined by his bankruptcy. This appointment was upheld. The devise was to trustees on trust to pay the rents and profits to T. P. W. for life, or until he should become bankrupt or insolvent; and from and after his decease, or from and immediately after his bankruptcy or insolvency, to the use of the children of T. P. W. as he should appoint, and in default to all the children equally. Lord Hatherley (then V.-C.) said that the case of *Haswell* v. *Haswell* was peculiar, but it was decided on the special words of the settlement. The settlement, which related to personalty only, contained two inconsistent directions: one, that the survivor of husband and wife should have power to appoint the fund; and the other, that the fund should be paid over immediately the children should attain 21; and the Court had to choose between these two inconsistent

directions. He also distinguished the case before him on the ground that the subject-matter was real estate; but it is doubtful if there is any substantial distinction between cases where realty and cases where personalty is the subject-matter of the power.

In *Re Stone* (3 I. R. Eq. 621), a testator gave his daughter a life estate in *lands*, and devised them after her death among her children, as she should by deed or will appoint. He also declared that if his daughter should alien or encumber her share, it should go to the persons next in remainder as if she were actually dead. She mortgaged her life estate, and subsequently executed her power of appointment. The Court distinguished *Haswell* v. *Haswell* on the ground that the power was expressly given to be exercised during the continuance of the estates given, that is, either as of necessity during the life estates, or during the existence of the estate otherwise determinable, because in very terms it provided that on the sooner determination the property should go as then appointed, to the extent appointed, and otherwise, as if no appointment were made. In the case before the Court, the power being expressly given in general terms, which could be exercised during the entire life of the donee, and the exercise of which was not by any words limited to the period of her enjoyment of the estate, it was held that the mere acceleration of the estates in remainder did not defeat that power.

In *Re Aylwin* (16 Eq. 585; 21 W. R. 864), a testator devised his interest in certain colliery leases and lands to trustees on trust (among other things) for his son Herbert during life or until bankruptcy or insolvency; and on his death, bankruptcy, or insolvency, to pay and apply the same for all or any of his children as he should appoint, and in default for the children equally. V.-C. Wickens considered that the power (which was a power to direct the payment of the rents of leaseholds as received, and which, so far, resembled *Wickham* v. *Wing*-more nearly than *Haswell* v. *Haswell*) must be considered as unaffected by the insolvency, and that it was therefore a subsisting power; (and see *Re Kelly, West* v. *Turner*, 59 L. T. 494).

On the whole, the rule may be taken to be as stated above in cases of powers in gross proper,—*i.e.*, powers relating to real estate. And the same rule may be taken to apply to powers extending over chattels real and personal estate, except in a case like *Haswell* v. *Haswell*, where there are inconsistent directions. The continued existence of the power leads to the inconvenience that persons may be entitled to a vested interest in possession subject to a divesting clause. It is settled law, in the analogous case of a legacy subject to a divesting clause, that the legatee is entitled to immediate payment without giving security to refund if the event happens upon which the legacy is divested (Roper Leg. 864). But it has not been decided whether the same rule applies to a vested share, subject to be divested by the exercise of a power; and until the Courts shall have decided the point, trustees cannot safely pay over a fund subject to such a power. Result of cases.

8. A power given to the owner of a particular estate, whether appendant or in gross, is extinguished by his acquisition of the fee-simple (*Cross* v. *Hudson*, 3 Bro. C. C. 30). Powers extinguished by merger in the fee.

But equity will interfere to effectuate the intention of the parties in certain cases, by making the intent of the person purporting to execute the power bear out the disposition he has affected to make (*ibid.*).

In *Mortlock* v. *Buller* (10 Ves. 292), the power of trustees for sale under a settlement was at law extinguished by the tenant for life's acquisition of the fee. Lord Eldon said, that if the purchaser had entered into a contract with the trustees with the approbation of the tenant for life according to the deed, the contract, once entered into and having bound the estate, should be made good by those who had got an interest, by the effect of their interest, if not by the authority of the trustees.

When the owner of the particular estate becomes seised in fee, the powers which he possessed over that estate cannot be any longer exercised, not so much on the ground that they have When execution sustained.

become merged in the fee, as because they were not intended to continue longer than is required for the purposes of the settlement; it follows therefore from this (as well as from the principle that appointments under powers which fail shall be made good out of the appointor's estate in the property appointed), that an appointment made under a power will be upheld in equity, although the donee thereof has acquired the fee since he made the appointment.

In *Sing* v. *Leslie* (2 H. & M. 68), estates were settled on A. for life, with remainder to B. for life, with remainders over for life and in tail, with an ultimate remainder to B. in fee; the settlement contained a power for every tenant for life, either before or when he should become entitled to the actual freehold, to charge the estate, but any charge by a tenant for life was to be inoperative, unless he or his issue afterwards became so entitled. B. by his will, in exercise of that power and of every other power enabling him, charged the estate, and disposed of his reversion; B. died without issue in A.'s lifetime. The intermediate estates having failed, and B. being entitled to the reversion in fee, the charges were established against his devisee out of his estate. In the events that happened, B.'s power never arose; if he had survived A., still the power would not have been in existence, for he would have had the fee.

Merger of charge.

In the converse case, when a power of charging has been exercised in favour of an object who afterwards becomes entitled in fee, the charge will merge, unless the person entitled to it keep it alive; but he will be presumed to intend to keep it alive, if it is for his interest (*ibid.*; *Grice* v. *Shaw*, 10 Ha. 76).

Powers extinct when purposes completed.

9. A power, whether appendant or in gross, is absolutely extinguished when all the purposes for which it was originally created have ceased to exist (*Wheate* v. *Hall*, 17 Ves. 80).

In *Wolley* v. *Jenkins* (23 B. 53, aff. 5 W. R. 281), the M. R. said that a power of sale and exchange in a settlement ceased to exist after the union of the life estate with the reversion in fee;

that such a power existed only for the purpose of the settlement, and during the time when the uses of the settlement were in existence.

But the object for which the power is given is in each case to be considered.

In *Trower* v. *Knightley* (6 Madd. 134), where there was a devise in trust in undivided moieties with a power of sale *during the continuance of the trust*, and one moiety vested absolutely, it was held that the power of sale must have been intended to continue until there were owners competent to deal with the whole estate.

In *Wood* v. *White* (4 M. & C. 460), where the property was devised in fifths, and there was a power of sale with a direction that it should continue as to such parts, if any, of the premises as should be subject to continuing trusts, it was held that the power had determined as to one fifth, the trusts of which had been exhausted, there being no necessity that the power as to the one share should continue in order to preserve it for the benefit of the other shares, as in *Trower* v. *Knightley*.

Question of intention;

It is to a great extent a question of intention in each case, to be determined on the construction of the instrument creating the power, and having due regard to the rule against perpetuities (*Re Cotton*, 19 Ch. D. 624). But, speaking generally, the power subsists, until all the trusts are exhausted and the whole estate is vested in fee in possession in the person or persons entitled: and the circumstance that one person is entitled to have his share of the fee conveyed to him, while the trusts of the other shares are still subsisting, does not prevent the exercise of a power of sale (*Taite* v. *Swinstead*, 26 B. 525).

how far affected by rule against perpetuity;

If the power of sale is unlimited in point of time, some limit must be found in order to avoid an infringement of the rule against perpetuity; and this limit, in wills and settlements framed in the ordinary way, is the period when the absolute interests vest in possession (*Lantsbery* v. *Collier*, 2 K. & J. 709; Sug. Pow. 859). But it does not follow that a power of sale which exceeds that period, if it be limited so as to avoid infringing the rule against perpetuity, is void. Thus, a devise

valid exercise of power after vesting of estate.

to trustees in trust for A. for life, and after his death for B. and C., adults, with a power of sale for the purpose of division; or a devise to trustees to divide among several adult persons named, with a power of sale for the purpose of division, would create a valid power; subject to this, that it must be exercised within a reasonable time and before the beneficiaries have called on the trustees to convey (*per* Jessel, M.R., *Peters* v. *Lewes, &c., R. Co.*, 18 Ch. D. at p. 434). In *Re Cotton* (19 Ch. D. 624), the devise was to trustees on trust for the testator's widow for life, with remainder for his eight children equally. The will contained elaborate powers of managing, raising money by mortgage, and of sale, during a period commencing on the death of the testator and ending with the expiration of twenty-one years after the death of the survivor of the persons named in his will. It was held by Fry, J., that the power could be exercised after the death of the widow and after all the children had attained twenty-one.

Power must not be repugnant.

It is conceived, however, that a mere power to B. to sell an estate devised to A., an adult, in fee would be repugnant and void, on the principles laid down in *Saunders* v. *Vautier*, Cr. & Ph. 240; (and see *Re Rosher*, 26 Ch. D. 801).

Exercise of power by mortgagee after acquiring title by Statute of Limitations.

A mortgagee who has been in possession for a period long enough to give him an absolute title to the fee under the Statute of Limitations, can still sell under the power of sale in his mortgage (*Re Alison, Johnson* v. *Mounsey*, 11 Ch. D. 284).

Trust for sale distinguished from power.

The case of a trust for sale must be distinguished from the case of a mere power. A trust is imperative, and changes the nature of the estate; and the beneficiaries are entitled only to a share of the proceeds, not to the estate itself (*Biggs* v. *Peacock*, 20 Ch. D. 200; 22 *ibid.* 284; *Re Tweedie*, 27 Ch. D. 315). Such trusts have never been considered obnoxious to the rule against perpetuities (*ibid.*).

Disability of beneficiaries becoming so by appointment.

It makes no difference that the interests of the persons whose disability occasions the need of using the power arise by virtue of an appointment made in execution of a power in the original instrument, and were not contained in such original instrument. In such a case the limitations under the appointment are to be

considered as if they had been inserted in the original settlement.

In *Re Brown* (10 Eq. 349), lands were, by marriage settlement, conveyed to the use of trustees and their heirs upon trusts for the husband and wife for life, and in default (which happened) of children of the marriage, for the children of A. as the wife should appoint. The settlement contained the usual power of sale. The wife appointed to the trustees and their heirs upon trust (subject to the life estates) as to four-fifths for B., C., D., and E., four of the five children of A., and their heirs as tenants in common, and as to one-fifth for F., the fifth child of A., for life with remainder over. F. was of unsound mind, not so found. B., C., D., E., and F. were all *in esse* at the date of the settlement, and were still living, and all except F. *sui juris*. V.-C. James said: "There is great force in the argument that directly the property gets into the hands of persons who are able to dispose of it absolutely, the power of sale must be gone. It is like the case of a power which is destructible directly the property vests in a tenant in tail in possession, who can, if he pleases, dispose of the whole estate. But I must consider the limitations under this appointment as if they had been inserted in the original settlement. That is a safe general rule to act upon, and it must be carried out whether for good or for evil. If they had been inserted in the original settlement, I think there is sufficient authority to show that as long as there is a settled estate in any part of the property subsisting, so long does the power remain in existence."

10. A power is not necessarily extinguished by having been once exercised; but may be exercised by different appointments at different times.

Power not necessarily extinct by being exercised.

Some powers from their nature are necessarily exhausted by a single execution: *e.g.*, a power of sale, where the whole subject-matter of the power is removed by the execution of the power from the operation thereof. Others are necessarily to be

Powers of leasing and jointuring.

exercised from time to time, as occasion shall arise: *e. g.*, it has never been doubted that a power of leasing may be so exercised; and it has been held that a power to jointure may be exercised in favour of the same wife at different times, provided that all the executions taken together do not exceed the limits of the power (*Zouch* v. *Woolston*, 2 Burr. 1136; *Hervey* v. *Hervey*, 1 Atk. 560).

Power exerciseable "at any time."

In *Digges' case* (1 Co. Rep. 173), Christopher Digges had power "*at any time during his life*," with certain consents, to revoke certain uses. It was resolved that he might revoke part at one time and part at another, and so of the residue, until he had revoked all: for the words "*at any time*" amount to as much, and are as if he had said "from time to time as often as he shall think good." As, if a man leases twenty acres of wood, and grants that the lessee may fell the timber trees at any time during the term, he may fell part at one time and part at another; (and see Co. Litt. 237 a).

Power of appointment among children.

A power of appointment among children need not be exercised *uno flatu;* but the property may be appointed at intervals as the exigencies of the family require. The very object of such a power is to provide for such exigencies as they occur (*Cuninghame* v. *Anstruther*, L. R. 2 Sc. & D. 223). In *Doe* v. *Milborne* (2 T. R. 721), a power to an executrix to give a daughter "what proportion she shall think fit" was held exerciseable at different times. It makes no difference that the power is not exclusive, and that the first appointment (not exhausting the fund) does not give a share to every object of the power (*Wilson* v. *Piggott*, 2 Ves. 354; *Bristow* v. *Ward*, *ibid.* 336).

Primary and secondary power.

And where there is a primary power and, in default of execution thereof, a secondary power (*e. g.*, a joint power in husband and wife, and, in default, a power to the survivor), a partial execution of the primary power does not prevent the exercise of the secondary power (*Mapleton* v. *Mapleton*, 4 Dr. 515; overruling *Simpson* v. *Paul*, 2 Ed. 34).

Power to lend money.

In *Versturme* v. *Gardiner* (17 B. 338), a power to trustees to lend from time to time any sum or sums not exceeding £2,500

to the tenant for life was held not to be exhausted by one loan of the whole; but after repayment the trustees could lend the money again. And in *Webster* v. *Boddington* (16 Sim. 177), where the power was to lend any sum or sums not exceeding £30,000, and the trustees lent £20,000, it was held that they might afterwards lend the residue; (but see *Brown* v. *Nisbett*, 1 Cox, 13). In *Krantzcke* v. *Robinson* (11 L. R. Ir. 500) trustees of a settlement had power, at the request of A., to raise any sum not exceeding £1,000, and to pay it to her. The trustees raised and paid £310; and it was held that they could afterwards raise and pay over the balance; (and see *Harrold* v. *Harrold*, 3 Giff. 192). In *Child* v. *Child* (20 Beav. 50) trustees were empowered to lend part of the trust funds to the husband with the consent of the wife; she consented to an immediate loan, and the trustees lent and took a covenant from the husband to repay it at the end of six months; the money was not called in, and the husband became bankrupt: the trustees were held not to be liable.

Alternative power to raise by sale or mortgage.

If the power be alternative—*e. g.*, to raise money by sale or mortgage—it is submitted that the exercise of the power of mortgaging does not preclude the donee from afterwards exercising the power of sale in order to pay off the mortgage (*Omerod* v. *Hardman*, 5 Ves. 722, 732); but this has been doubted (*Palk* v. *Lord Clinton*, 12 Ves. 48).

A power to advance money towards effecting the promotion of a beneficiary in the army was extinguished by the abolition of purchase (*Re Ward*, 7 Ch. App. 727). But a power in a settlement to withdraw funds and lay them out in the purchase of a trade for the benefit of the husband and wife was held exerciseable after the death of one for the benefit of the survivor (*Doorly* v. *Arnold*, 18 W. R. 540). A power of advancement exerciseable during minority of course ceases when the object attains 21 (*Clarke* v. *Hogg*, 19 W. R. 617). It is, however, a question of construction in each case, and in *Pride* v. *Fooks* (2 Beav. 430) the power of advancement was held exerciseable after 21, although the powers of maintenance and education were not; (and see *Re Breed*, 1 Ch. D. 226).

A power may co-exist with the fee in freeholds;

11. A power may co-exist with the fee (Sug. Pow. 93).

If a man limits his estate to such uses as he shall appoint, and in the meantime and until such appointment to the use of himself and his heirs, the fee simple continues to reside in the settlor, subject to be divested by an exercise of his power of appointment (Co. Litt. 216 a, note; *Maundrell* v. *Maundrell*, 10 Ves. 246).

and copyholds.

In *Glass* v. *Richardson* (9 Ha. 698; 2 D. M. & G. 658), the question was whether, under a devise of copyholds to such uses as A. and B. should appoint, and subject to and until such appointment to A. and B. in fee, A. and B. could make a title to a purchaser without being admitted. It was held that they could, and specific performance was decreed. The defendants contended before the Vice-Chancellor that in the case of freeholds, the co-existence in the same party of the fee and of the power to appoint the fee depended wholly on the Statute of Uses; and that, the Statute of Uses not applying to copyholds, the power and fee could not co-exist. But this argument assumed that, in the case of copyholds, the power and the fee could co-exist, which could not be the case, at all events before admittance, as the devisee takes no estate until admittance; and to adopt this argument would be to apply to estates not in any manner affected by the Statute of Uses doctrines and doubts affecting conveyances of estates operating under that statute, and which, after what fell from Lord Eldon in *Maundrell* v. *Maundrell*, the Vice-Chancellor felt warranted in saying never had any solid foundation.

Effect of divorce on exercise of powers.

12. Dissolution of marriage by the Court does not extinguish a settlement made on the marriage, or any of the powers therein (*Burton* v. *Sturgeon*, 2 Ch. D. 318; *Fitzgerald* v. *Chapman*, 1 Ch. D. 563; overruling *Jessop* v. *Blake*, 3 Giff. 639;

Swift v. *Wenman*, 10 Eq. 15, and *Fussell* v. *Dowding*, 14 Eq. 421).

No effect in Chancery.

The Court of Chancery had no jurisdiction to deprive an adulteress whose marriage had been dissolved of any benefit under a settlement made on the marriage (*Evans* v. *Carrington*, 2 D. F. & J. 481). There is no total failure of consideration, nor does our law inflict forfeiture as a penalty of adultery; although by the Statute of Westminster the Second (13 Edw. I. st. 1, c. 34) an adulteress forfeits her dower, a husband does not by adultery forfeit his estate by curtesy nor the wife her jointure (*Re Walker*, Ll. & G. *temp.* Sug. 326).

Nullity and divorce distinguished.

It is suggested that a decree of nullity should stand on a different footing. The decree of divorce declares the marriage dissolved: the decree of nullity declares it null and void; and such a marriage is absolutely void *ab initio*, and not merely voidable; (see *Elliott* v. *Gurr*, 2 Phillim. 19; and 5 & 6 Will. IV. c. 54). In cases where the marriage is either void *ab initio*, or is declared void, any settlement made in consideration thereof has a consideration that is either illegal or has failed, and ought not, therefore, to be upheld. It must, however, be admitted that the power to vary settlements which is conferred by 22 & 23 Vict. c. 61, s. 5 (see *infrà*), is opposed to this view; (see *Langworthy* v. *Langworthy*, 11 P. D. 85; *Robinson* v. *Dickenson*, 3 Russ. 399; *Chapman* v. *Bradley*, 33 B. 61; 4 D. J. & S. 71; *Bond* v. *Walford*, 32 Ch. D. 238).

Judicial separation has no effect.

A judicial separation does not affect the capacity of husband and wife to execute joint powers (20 & 21 Vict. c. 85, s. 26).

22 & 23 Vict. c. 61, s. 5.

By 22 & 23 Vict. c. 61, s. 5, it is enacted: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial and post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled, either for the benefit of the children of the marriage or of their respective parents, as to the Court shall seem fit." The

Act, it will be seen, extends to cases of nullity as well as of divorce (see *Langworthy* v. *Langworthy*, 11 P. D. 85).

Extent of powers of the Court.

The Court has declined to interfere with a power of appointment among children, vested in the wife (*Davies* v. *Davies*, 37 L. J. P. & M. 17; *Seatle* v. *Seatle*, 30 *ibid.* 216); and in *Hope* v. *Hope* (L. R. 3 P. & D. 226) the Court doubted whether the section authorized an interference with the power of appointing new trustees. But in *Maudslay* v. *Maudslay* (2 P. D. 256) the Judge Ordinary varied the power of the guilty party of appointing new trustees, and his interest in, and power of appointment over, the fund brought into settlement by the innocent party; (see, too, *Oppenheim* v. *Oppenheim*, 9 P. D. 60).

Issue necessary to give Court jurisdiction under the section.

The Court had no jurisdiction to interfere under the Act above referred to, unless there was issue of the marriage living at the date of the application to the Court (*Graham* v. *Graham*, L. R. 1 P. & D. 711; *Corrance* v. *Corrance*, *ibid.* 495).

41 & 42 Vict. c. 19, s. 3.

But it is now enacted by 41 & 42 Vict. c. 19, s. 3, that the Court may exercise the powers vested in it by 22 & 23 Vict. c. 61, s. 5, notwithstanding that there are no children of the marriage. In *Ansdell* v. *Ansdell* (5 P. D. 138), the decree *nisi* was made before, the decree absolute after, the Act came into force; and the Act was held to be retrospective; (but see *Yglesias* v. *Yglesias*, 4 P. D. 71, where the head-note appears to be inaccurate).

Powers of Court and principles of their exercise.

The powers of the Court under these statutes, and the principles on which such powers should be exercised, have been fully considered in the recent case of *Wigney* v. *Wigney* (7 P. D. 177; *ibid.* 228). The Court of Appeal held that the conduct of the parties might properly be taken into consideration in determining the provision to be made for them respectively; and that the judge had an absolute discretion as to the provisions to be made. But they made provision for the payment, out of the income given to the wife, of the unsecured debts incurred by the husband for the joint establishment; and also preserved the rights of the husband's mortgagees prior to the presentation of the petition for divorce, which had been preserved by the President in his order. In the second case (7 P. D. 228), the

President upheld a charge given by the guilty husband to his solicitors on the day on which the divorce petition was heard. The decision was based on general principles affecting the mode of exercising the discretion of the Court (p. 232); but the judge expressed his opinion that he had the power, if he thought fit, to affect the rights of the mortgagees.

Result of the decisions on the point.

On the cases as at present decided, it may be taken that the Court will not affect by its order the rights of third persons, created before the presentation of the petition, or possibly before the decree *nisi;* and it is submitted that, notwithstanding the dictum of the President in *Wigney* v. *Wigney*, above mentioned, it is still open to question whether a sale or mortgage, made or created before the presentation of the petition to vary (which cannot be until after the decree absolute), can be impeached or set aside by the Court. The President decided in the last-named case that, until the presentation of the petition to vary, there was no *lis pendens;* and if this be so, it is submitted that there is nothing to affect or bind a purchaser, and that the analogy of assignments of personalty by a prisoner before conviction, which was relied on in the argument, is complete; (see, too, *Paul* v. *Paul*, L. R. 2 P. & D. 96).

Power in default of children exerciseable after divorce.

It may here be added that the provisions of the Divorce Act (20 & 21 Vict. c. 85, s. 57), enabling divorced persons to marry again, and which may be thought to authorize the re-marriage of the parties, have been held not to prevent the donee of a power of appointment in default of children from exercising the power so as to acquire an immediate right of payment, after decree for divorce, in a case where there was no child of the marriage (*Bond* v. *Taylor*, 2 J. & H. 473).

Effect of administration decree.

13. A decree for administration does not extinguish or suspend powers affecting the property to which the action relates; but powers of management, as distinguished from powers of appointment, can

be exercised thereafter only with the sanction of the Court.

The donee of the power appoints, and the Court sanctions or disapproves (*Re Gadd*, 23 Ch. D. 134).

On powers of management, and of appointment.

Powers of management—*e. g.*, powers of sale, leasing, investment, and appointment of new trustees—cannot, after decree, be exercised without the sanction of the Court, and the Court will see that they are properly exercised. This, however, does not apply to the statutory power of sale given to a tenant for life by the Settled Land Act (*Cardigan* v. *Curzon-Howe*, 30 Ch. D. 531). But powers of appointment—*i. e.*, powers that are arbitrary as to their execution or non-execution, and which affect the distribution (not the management) of property—are exerciseable after the institution of an action, as well after as before decree, without the necessity of any application to the Court (*Sillibourne* v. *Newport*, 1 K. & J. 602). And the Court will not, as a general rule, control the donee's discretion in the exercise of powers of management (see *Re Gadd*, 23 Ch. D. 134; *Bethell* v. *Abraham*, 17 Eq. 24, where the power was one of investment; *A.-G.* v. *Clack*, 1 B. 467, and *Webb* v. *Lord Shaftesbury*, 7 Ves. 480, in both of which the power was to appoint new trustees; *Cafe* v. *Bent*, 3 Hare, 245, where the power was to appoint new trustees and invest). In *Walker* v. *Smallwood* (Ambl. 676), the bill was by creditors for the sale of an estate to pay debts; and all parties had put in their answers and submitted to the jurisdiction. The Court held that the heir-at-law or devisee was constituted a trustee for the creditors, and had, by putting in an answer, submitted to a sale by the Court, and that no sale could be made except by the Court. *Mitchelson* v. *Piper* (8 Sim. 64) was a case of payment of debts by an executor; and *Widdowson* v. *Duck* (2 Mer. 494), one of investment by executors.

Principle on which the Court acts.

The principle is, that where a power, which is purely discretionary, is given to trustees, the Court cannot exercise such power or compel the trustees to exercise such power in any particular manner, but can restrain them from exercising it in

an improper manner. If, however, there is a duty coupled with the power, then the Court can compel the trustees to perform that duty; (see *Nickisson* v. *Cockill*, 3 D. J. & S. 622; *Gisborne* v. *Gisborne*, 2 App. Ca. 300; *Tempest* v. *Lord Camoys*, 21 Ch. D. 571; *Re Gadd*, 23 Ch. D. 134; *Re Courtier*, 34 Ch. D. 136).

Power of appointing trustees under S. L. Act, 1882.

The power of appointing trustees for the purposes of the Settled Land Act, 1882, created by sect. 38 of the Act, is given to the Court, not to the tenant for life; and the same principle, therefore, does not apply to appointments of trustees under that section; but the Court exercises a judicial discretion in making the appointment. Thus, in *Re Carr* (19 Dec. 1887), Stirling, J., in chambers, refused to appoint the nominees of the tenant for life where there were trustees of the will already existing, who were ready and willing to act, and against whom no allegation was made; (and see *Wheelwright* v. *Walker*, 23 Ch. D. 752; *Re Kemp*, 24 *ibid.* 485; *Re Knowles*, 27 *ibid.* 707).

Effect of decree on necessity for obtaining leave.

The decree does not extinguish the powers, but merely renders it necessary to obtain from the Court leave to exercise them; and it is conceived that, although such leave ought to be obtained before exercising the power, yet it is not a necessary condition precedent. In *Graham* v. *Graham* (16 B. 550), an appointment of new trustees (apparently after decree, though the report is not very explicit) without leave was held not necessarily invalid; and if the Court would have authorized an expenditure, had application been made to it, such expenditure will sometimes be allowed on passing accounts subsequently; (see *Brown* v. *Smith*, 10 Ch. D. 377). So, where trustees sold without the sanction of the Court, after further consideration of a suit in which liberty to apply was reserved, they were allowed their costs of the sale (*Re Mansel*, *Rhodes* v. *Jenkins*, 33 W. R. 727). But trustees could not be advised to act without the authority of the Court, after decree.

Institution of action does not affect powers.

The mere institution of an action does not prevent trustees from exercising powers (*Cafe* v. *Bent*, 3 Ha. 245); nor does it prevent executors from selling and making a good title to chattels real (*Neeves* v. *Burrage*, 14 Q. B. 504).

Powers of executors after decree.

And different considerations apply to executors and trustees; for even an administration decree, if there be no injunction or receiver, does not deprive executors of their legal power to deal with the assets (*Berry* v. *Gibbons*, 8 Ch. 747; *Re Barrett*, 43 Ch. D. 70); and since the Judicature Acts, a voluntary payment by the executor to any one creditor after action, but before decree, is good, and will be allowed to him in taking the accounts (*Re Radcliffe*, 7 Ch. D. 733; *Vibart* v. *Coles*, 24 Q. B. D. 364). Such a payment, before the Acts, was allowed in equity, but not at law (see Williams, Exors. 8th ed. 1041).

Trustee may ask advice of Court before decree.

A trustee is, however entitled to come to the Court for its sanction after action, and before decree; and will be allowed his costs of doing so (*Turner* v. *Turner*, 30 B. 414; and see now R. S. C. 1883, Ord. LV.).

No general administration order.

In *Re Hall* (54 L. J. Ch. 527), an administration action was commenced by a beneficiary under a will; but the Court, acting under the discretion conferred by Ord. LV. r. 10, did not make any order for general administration, but directed certain inquiries, including an inquiry whether any and what proceedings should be taken for the appointment of new trustees of the will. Pearson, J., held that the powers of the trustees were not affected, except so far they might interfere, or come into conflict, with the inquiries directed by the order. In the case before him, he considered that the appointor ought to have submitted the name of the proposed trustee to the judge in chambers; but there being no valid objection to the person actually appointed without leave, it was unnecessary either to sanction the appointment formally, or to refer the whole matter to chambers.

Action wound up, liberty to apply reserved.

In *Re Mansel* (33 W. R. 727) the same judge held that after an action had been practically terminated and wound up by the order on further consideration, the mere reservation of liberty to apply did not render it incumbent on the trustees to come to the Court for leave before exercising powers contained in the will.

O. LV. r. 12.

By R. S. C. 1883, Ord. LV. r. 12, it is provided that the issue of a summons under r. 3 of that Order shall not interfere with, or control, any power or discretion vested in any executor, administrator, or trustee, except so far as such interference or

control may necessarily be involved in the particular relief sought.

How far Court will interfere with powers of appointment.

The Court does not interfere with the execution by trustees of powers of appointment, if such execution is made *bonâ fide*. Where the disposition of a trust estate among certain objects is made by the author of the trust to depend upon the discretion of the trustee, the Court will, upon a proper proceeding, inquire into the manner in which the trust has been administered, and require that such discretion shall be fairly and honestly exercised; and so long as it appears to be so exercised, the Court will not deprive the trustee of the discretionary power which he possesses, or itself assume the exercise of that power. But, to avoid a repetition of actions, where there is reason to apprehend that the trustee's exercise of the power may be liable to question, the Court may require the discretion of the trustee to be exercised under its view; (see *Costabadie* v. *Costabadie*, 6 Ha. 410, in which case the testator gave his widow his property upon trust to apply the same for the use of herself and their children, according to her own discretion during her life; see, too *Talbot* v. *Marshfield*, 4 Eq. 661, on appeal 3 Ch. 622; *Lord* v. *Bunn*, 2 Y. & C. C. C. 98; *Marquis Camden* v. *Murray*, 16 Ch. D. 161).

Where proceedings are pending.

The rule is the same, although proceedings are pending for the purpose of impeaching an exercise of the power. In *Ward* v. *Tyrrell* (25 B. 563), the donee of a power appointed to some of the objects, excluding the others. A bill was filed to set aside the appointment, and the donee then, *pendente lite*, appointed afresh in a manner authorized by the power, but declared that the second appointment should not operate, unless the former was set aside by decree of the Court. The earlier appointment was set aside and the second upheld. In *Weir* v. *Chamley* (1 Ir. Ch. R. 295), the appointment, made *pendente lite*, was set aside, not because of the existence of the suit, but because the appointment was held to be a fraud on the power.

How far with powers of maintenance.

And although the maintenance of its wards is peculiarly within the care of the Court, trustees are not, as a general rule, controlled in their exercise of powers of maintenance (*Sillibourne*

v. *Newport*, 1 K. & J. 602). In *Brophy* v. *Bellamy* (8 Ch. 798), there was the ordinary power for the maintenance of children; and a petition was presented in the suit, praying for the payment of the income of five-sixths of a fund in Court to the father of the children. The trustees stated that they thought it proper and for the benefit of the children; and the Court declined to control their discretion; (and see *Re Lofthouse*, 29 Ch. D. 921).

Where trustees refuse to exercise discretion.

If the trustees refuse to exercise their discretion at all, the Court will treat it as a trust, and direct an inquiry how much ought to be allowed for maintenance (*White* v. *Grane*, 18 B. 571; and see *Hewett* v. *Hewett*, 2 Eden, 332). And in *Re Hodges*, *Davey* v. *Ward* (7 Ch. D. 754), and *Re Roper* (11 Ch. D. 272), the Court considered that the trustees were acting capriciously, and interfered accordingly. But if, by the instrument creating the power, the discretion is made absolute and uncontrollable, the Court cannot interfere (*Gisborne* v. *Gisborne*, 2 App. Ca. 300; *Tabor* v. *Brooks*, 10 Ch. D. 273). But in *Brown* v. *Brown* (52 L. T. 853), where the trustees had power to invest in such investments as, in their uncontrolled discretion, they should think fit, the Court, although allowing as discharges to the trustees investments in Portuguese bonds and the like, nevertheless directed these securities to be sold.

Payment into Court destroys trustee's powers.

A trustee who pays his trust fund into Court under the Trustee Relief Act, thereby retires from the trust (*Re Williams*, 4 K. & J. 87), and cannot afterwards exercise any discretionary power (*Re Coe*, *ibid.* 199; *Re Tegg*, 15 W. R. 52; but see *Re Landon*, 40 L. J. Ch. 370).

CHAPTER III.

CREATION OF POWERS.

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Three requisites.

1. There are three requisites to the valid creation of a power, namely, sufficient words to denote the intention, an apt instrument, and a proper object (Sug. Pow. 102). The instruments by which powers may be created have already been considered. It is now proposed to consider what words will denote an intention to create a power.

No technical words necessary.

2. No technical or express words are necessary, either in a deed or in a will, to create a power.

All that is requisite is that the intention to create a power should be clearly expressed, bearing in mind that terms of art have their technical, and ordinary words their ordinary, meaning.

In *B. of Oxford* v. *Leighton* (2 Vern. 376), a marriage settlement contained a provision that, in default of issue, the trustee should convey to such uses as the survivor of the husband and wife should appoint; this provision amounted to a power of revoking and limiting new uses. So a recital in a deed or an exception out of a prohibition may be sufficient. In *Beachcroft* v. *Broome* (4 T. R. 441), a devise before the Wills Act to A. and his heirs, but if he should die without issue or without settling or disposing of the same, then over to B., was held to give A. a power of disposition. In *Read* v. *Nashe* (1 Leon. 147), an estate was devised in strict settlement (A. being the first tenant in tail), and contained a provision that if A. should alienate otherwise than for jointures for life, or for leases for twenty-one years, he should forfeit his estate; this gave A. a power of jointuring and leasing.

Exception. Recital.

By implication.

A devise of real estate to the testator's family, provided that, if his personal estate and Blackacre should not pay his debts, his executors should raise the same out of the devised estate, gives the executors a power of sale (*Bateman* v. *Bateman*, 1 Atk. 421). When a testator devises real estate alone to raise money, there is an implied power of sale; but it is otherwise, where there is a mixed devise of real and personal estate; for in such a case *non constat* that there is not enough personalty to raise the sums

required (*Curling* v. *Austen*, 2 Dr. & Sm. 129, 136); or at least it would be necessary to show that the personalty was insufficient (see *Dike* v. *Ricks*, Cro. Car. 335). In *Tait* v. *Lathbury* (1 Eq. 174), a settlement of personalty contained a power of sale and investment in real estate, and a direction that such real estate should be considered as personalty for the purposes of the settlement, but contained no express power of sale over the real estate to be purchased; the original power of sale was held to extend to the purchased real estate; (and see *Master* v. *De Croismar*, 11 B. 184; *Sheffield* v. *Coventry*, 2 D. M. & G. 551; *Garnett-Orme* to *Hargreaves*, 25 Ch. D. 595). In the last case there were two marriage settlements of personal estate, with the usual trusts to continue investments or to sell, and covenants to settle after acquired property upon the same trusts. Real estate came into settlement under this covenant; and Bacon V.-C. held that the trustees had power to sell it.

Ex necessitate rei.

In *Downes* v. *Timperon* (4 Russ. 334), a testator by his will gave real and personal estate to a married woman; and by codicil he declared that if she should die without disposing by will of such interest as she took under his will, such interest should go to her children. This gave her a power, as she could not otherwise have disposed of her interest, being covert. In *Wood* v. *White* (4 M. & Cr. 460), a testator gave (amongst other things) one-fifth of his residuary real estate to trustees on trust for his daughter until 25 or marriage, with a direction that, if she married under that age, her one-fifth should be conveyed and settled on certain trusts, and he gave the trustees a general power of sale. On the daughter's marriage, a settlement was executed which recited that no part of the real estate had been sold, though it was intended that the same should be sold under the power contained in the will, and assigned all the daughter's share of the produce of the sale on certain trusts. The power of sale contained in the will was held to have determined on the daughter's marriage; but the settlement, showing a clear intention for a conversion of the realty into money, and a dealing with and settlement of money, which could only arise from such conversion, and being made

between trustees, who alone could make the conversion, and the *cestuis que trust*, who alone could direct it, was held to give an implied power of sale, although it did not in terms direct it. The Lord Chancellor (p. 481) considered the rules applicable to the implication of power of sale in wills to be strongly analogous, the power being implied for the purpose of carrying into effect the declared intention. In *Affleck* v. *James* (17 Sim. 121), a trust for investment of real and personal estate, coupled with a receipt clause of the purchase-money of property sold, was held to authorize the sale of the real estate. In *Wheeler* v. *Howell* (3 K. & J. 198), the Court supplied a power by adding the necessary words to an unfinished paragraph. In *Knocker* v. *Bunbury* (6 Bing. N. C. 306), the testator desired his executors after payment of his debts to pay and make over the rest of his property to his daughter, and to her children after her death. This was held to give the executors power to settle a freehold estate on the daughter for life with remainder to her children in fee.

But in *Re Holloway* (37 W. R. 77), the testator empowered his trustees in their discretion "to continue the whole or any part of my estate in the firm of H. Brothers, or to invest, re-invest and lend any part of my estate to them without any personal liability for the safety of such investment." North, J., distinguished the case from *Affleck* v. *James* on the ground that this was only a discretionary power to invest in a manner which would otherwise be unlawful, and held that there was no implied power to sell the testator's real estate.

Power implied from the word assigns.

A power of appointment may, it seems, be implied from the use of the word "assigns."

In *Tapner* d. *Peckham* v. *Merlott* (Willes, 177), there was a devise to A. for 99 years, if he should so long live, and after divers remainders, an ultimate remainder to the heirs and assigns of A. If A. had had an estate of freehold, instead of for years, the rule in *Shelley's case* would have applied; the contest was between the heir and the devisee of A. The case was decided on another point; but L. C. J. Willes said: "Another answer suggested itself to me, on which I will give no mature opinion, because there is no occasion; but I think there is some

weight in it, that this word [assigns], though it does not alter his (the termor's) own estate, must give him a power of disposing of it. For supposing this last remainder had been to him and his heirs, or to such other person as he should appoint, he might certainly in that case have disposed of it by his will, and I am inclined to think, as at present advised, that the word 'assigns' may admit of this construction."

In *Quested* v. *Michell* (24 L. J. Ch. 722), a testator gave real and personal estate to the use of trustees to pay the rents to his niece for life; and after her death he gave, devised, and bequeathed his real and personal estate to the heirs, executors, administrators, and assigns of his said niece. The rule in *Shelley's case* did not apply, as the life estate was equitable, and the remainder legal. As to the personalty, the niece took it absolutely; as to the real estate, it was contended that the niece had only a life estate, with no power to dispose of the reversion after her death, since the estate was limited to her heirs by way of purchase. V.-C. Kindersley said: "The expression 'heirs and assigns' is a common one, and is often used without meaning anything more than the limitation of an absolute interest; but in this case it is impossible to give any meaning to the word, unless you attribute to the testator an intention to give the life-tenant a power, by virtue of which she could give an estate to some other persons in the character of assigns distinct from her heirs." And he accordingly decided that there was a limitation after the death of the life-tenant, to the persons who should answer the designation of her assigns, and that that could only be done by giving her an absolute general power of appointment, and in default of appointment, to her heirs. It will be observed that in both these cases the Court must have read "*and*" as equivalent to "*or*."

In *Brookman* v. *Smith* (L. R. 6 Ex. 291), the Court, although expressly refraining from impeaching the case last cited, said that, in general, the words "and assigns" following the word "heirs" have now no operation. "The words, 'to assigns for ever,' have at the present day no conveyancing virtue at all, but are merely declaratory of the power of alienation, which the

purchaser would have without them" (Williams, R. P. 16th ed. 171). It is to be observed that in *Quested* v. *Michell* the niece had no power of alienation except such as was to be implied from the use of that word "assigns," and the Vice-Chancellor gave effect to what he considered the intention. In the case in the Exchequer, which was decided and affirmed (7 Ex. 271) on other grounds, the ultimate limitation was to the heirs and assigns of the life-tenant, a married woman, as if she had continued to be unmarried. This limitation was contained in a will by a father made in execution of a covenant contained in the daughter's marriage articles. The Court thought that the term "heirs and assigns" was used in the ordinary conveyancing meaning; it was so used in other places in the will. Moreover, in the corresponding limitation in the articles, the word "assigns" was omitted; but their opinion was based on what they considered the testator's intention. And the Court of Exchequer Chamber expressly refrained from giving any opinion on this point, which they appeared to think by no means clear.

3. It is only necessary that the intention to create a power should be clear, but it is frequently difficult to determine, whether it is intended to pass an estate, or merely to give a power; and supposing a power to have been created, of what nature and exent it is. The cases appear to establish the following rule:

Gift for life with power added does not give absolute estate if power be not exercised.

If an estate for life be first given and a power of disposition by deed or will added, this does not amount to an absolute gift, so as to vest the property in the donee for an estate that will devolve upon his representatives, if he do not exercise his power of appointment.

"The distinction is perhaps slight which exists between a gift for life, with a power of disposition superadded, and a gift to a person indefinitely, with a superadded power of disposition by deed or will. But that distinction is perfectly established: that

in the latter case the property vests" (*Bradly* v. *Westcott*, 13 Ves. 453, *per* Grant, M. R.). The difference is important for many reasons: not only may the limitation in default of appointment give the property to some one other than the life tenant's heirs, but a charge on the fee belonging to the tenant for life would not merge, as would be the case if he were owner in fee simple (*Re Benton, Smith* v. *Smith*, 19 Ch. D. 277; and see *Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521).

The rule applies equally to real and to personal estate (*Reith* v. *Seymour*, 4 Russ. 263). In that case a testator, by his will, gave all his personal estate to his wife for life, and from and after her decease, one moiety thereof was to be at her disposal, either by will or otherwise. This was held to amount to an estate for life with a power of appointment; (and see *Nannock* v. *Horton*, 7 Ves. 391; *Liefe* v. *Saltingstone*, 1 Mod. 189; 2 Lev. 104; Carter, 232; *Archibald* v. *Wright*, 9 Sim. 161; *Scott* v. *Josselyn*, 26 B. 174; *Shaw* v. *Jones-Ford*, 6 Ch. D. 1; *Re Thomson, Herring* v. *Barrow*, 13 Ch. D. 144; 14 *ibid.* 263; *Re Pounder*, 56 L. T. 104).

Gift of use of plate.

In *Espinasse* v. *Luffingham* (3 J. & L. 186), the testator bequeathed to his wife "all the household furniture and moveable goods and chattels in and belonging to my said dwelling-house and premises, except my books. I also bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper." The Lord Chancellor of Ireland considered that the testator's intention clearly was to confine the wife to the enjoyment for her life of the plate, but with a power of disposition of any part. The testator began a new bequest, and altogether changed his language; he knew how to give personal property absolutely, and used proper language for that purpose. It was not therefore a case in which a bequest in those terms stood alone.

In *Pennock* v. *Pennock* (13 Eq. 144), a testatrix, in execution of a power, appointed shares of real estate to her husband in trust to stand possessed thereof, and to enjoy the rents and profits "for his own absolute use and benefit for and during the

term of his natural life, with power to take and apply the whole or any part of the capital arising therefrom to and for his own benefit, and from and after his decease" over. This gave the husband a life estate with a power of appointment; (see, too, *Re Pedrotti*, 27 B. 583; and *Holloway* v. *Clarkson*, 2 Ha. 521).

Dictum of L. J. Christian to the contrary.

On the other hand, in *Reid* v. *Atkinson* (5 I. R. Eq. 373, where the words were (following a gift of all his real and personal estate to his wife) "to have, hold, and enjoy in the fullest and amplest manner for the term of her life, with full power to dispose of all the aforesaid property, both real and personal, as she may judge wisest and best." The point *decided* was that these words precluded any precatory trust, but L. J. Christian says (pp. 382—3): "It was assumed on both sides that the effect of the will was to give the testator's wife an estate for life only, with a power of appointment superadded. Now I am not sure at all that such is the effect of this will; and I am speaking here, not so much regarding the technical result of the limitations, as of the intention which the language holds up to us as having been actually present to the testator's mind. . . . Full enjoyment during life, full power to dispose of, these things exhaust the advantages of property, and are comprised in the very idea of property," and he thought the better construction of the will was the one which would make the wife the universal recipient of everything, "with a lavish accumulation of language directed to show that her enjoyment and dominion were to be as boundless as the limit of human life and the nature of human proprietorship admitted the possibility of." As the wife had made a will sufficient to execute the power (p. 163) it was unnecessary to decide this.

Unlimited gift of income with power superadded.

If the gift is of income only, but is unlimited in point of time, it is equivalent to an absolute gift of the capital, and the superadded power will not cut it down (*Southouse* v. *Bate*, 16 B. 132; *Weale* v. *Ollive*, 32 B. 421).

Gift for life with remainder to general appointees by

A gift to a married woman for her separate use for life without restraint on anticipation, with remainder as she should, notwithstanding coverture, by deed or will appoint, with

remainder to her executors, or administrators, is an absolute gift to her sole and separate use (*London Chartered Bank, &c.* v. *Lempriere*, L. R. 4 P. C. 572, 595). deed or will, with remainder to executors and administrators.

And a bequest to a female (whether sole or covert) for her separate use for her life, and after her decease to such persons as she shall appoint, and in default of appointment, to her executors, administrators, and assigns, is equivalent to an absolute gift; and the effect is the same, although the power is testamentary only. The female's executors could only take the fund as part of her estate, and if she disposed of it during her life, her executors could not dispute or claim in opposition to the act of their testatrix (*Holloway* v. *Clarkson*, 2 Ha. 521; *Devall* v. *Dickens*, 9 Jur. 550; *Page* v. *Soper*, 11 Ha. 321; *Gardiner* v. *Young*, 34 L. T. 348; *Re Onslow*, 39 Ch. D. 622). A limitation to the executors and administrators of an individual is, as to personal estate, the same as a limitation to the right heirs as to real estate (15 Ves. 537). Gift for life with remainder to appointees by will, remainder to executors and administrators.

It makes no difference whether the power is contained in a will or a settlement. In either case the ultimate limitation to the executors and administrators of the donee in default of appointment must bear the same construction (*Anderson* v. *Dawson*, 15 Ves. 536; *Daniel* v. *Dudley*, 1 Ph. 1; *Page* v. *Soper*, 11 Ha. 321); although, in *Bulmer* v. *Jay* (3 M. & K. 197), Lord Brougham, on the special construction of the settlement, held that the ultimate limitation to the executors and administrators of the wife was equivalent to a trust for her next-of-kin. But this case stands alone (1 Ph. 7) and has never been followed. No difference between will and settlement.

"But there is a great difference between a limitation to the executors and administrators and a limitation to the next-of-kin. The former is, as to personal property, the same as a limitation to the right heirs as to real estate; but a limitation to the next-of-kin is like a limitation to heirs of a particular description which would not give the ancestor, having a particular estate, the whole property in the land" (*per* Sir W. Grant, M. R. in *Anderson* v. *Dawson*, 15 Ves. at p. 536). Limitation to next-of-kin.

An ultimate limitation to the personal representatives of the To personal

representatives.

donee is, *primâ facie*, a limitation to the executors or administrators in their representative capacity, whether the limitation be contained in a will (*Saberton* v. *Skeels*, 1 R. & M. 587; *Re Crawford*, 2 Dr. 230; *Re Wyndham's Trusts*, 1 Eq. 290; *Alger* v. *Parrott*, 3 Eq. 328), or in a deed (*Re Best*, 18 Eq. 686). But this *primâ facie* meaning will, of course, give way to an expression of a contrary intention, and may be controlled by the context, so as to be read as equivalent to "next-of-kin" (*Baines* v. *Ottey*, 1 M. & K. 465; *Daniel* v. *Dudley*, 1 Ph. at p. 6: *Briggs* v. *Upton*, 7 Ch. 376).

If the donee of a general power of appointment over a fund appoint by deed to his own executors and administrators, the effect is to make the appointed property part of his personal estate (*Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559; and see *Webb* v. *Sadler*, 8 Ch. at p. 427).

Secus, if there is no ultimate remainder to executors and administrators.

It is submitted that the mere fact of the donee being a married woman is not enough to make the absolute interest vest, if there be no ultimate remainder to her executors and administrators, notwithstanding a dictum of Lord Romilly, in *Trimmell* v. *Fell* (16 B. 537, 541), to a contrary effect.

Rule in *Shelley's case*.

If the subject-matter of the power is real estate, and there is a remainder in default of appointment to the heirs of the life-tenant, the life estate and the fee will coalesce, by the rule in *Shelley's case;* and it seems that the right to defeat the estate given and to make those take by purchase, who, if the power were not exercised, would take by descent, cannot vary the construction of the gift. In *Richardson* v. *Harrison* (16 Q. B. D. 85), a freehold messuage was devised to trustees upon trust for A. for life, and after her death upon trust for her children, as she should by deed or will appoint, and in default of such appointment, in trust for A.'s right heirs. It was held that, as the trustees had the fee simple, and both the estate for life devised to A. and the remainder in fee to her heirs were equitable estates, they coalesced according to the rule in *Shelley's case*. But it will be otherwise, it seems, if the heir be *persona designata*. In *Brookman* v. *Smith* (L. R. 6 Ex. 291) (affirmed on another point, 7 Ex. 271), there was a devise by a testator

(in execution of a covenant in his daughter's marriage articles) of real estate to the use of the husband for life, with remainder to the use of the wife for life, with remainder to the use of the issue of the marriage; the ultimate limitation was in case every child born or to be born should die under 21 and without leaving issue, then to the use of the heirs and assigns of A. as if she had continued sole and unmarried. These words would have precluded A.'s own son, if she had married again and had a son, from succeeding; and were held, therefore, not to be words of limitation, but to point to *persona designata;* (and see *Evans* v. *Evans*, (1892) 2 Ch. 173).

Remainder to the heirs of the body of life tenant as he shall appoint.

A devise to A. for life, and after his death to the heirs of his body as he shall by deed or will appoint, and in default of appointment, to the heirs of the body of A. as tenants in common, with a devise over in fee for want of such issue, gives A. an estate tail, according to the well-known rule that technical words must have their legal effect, unless it is perfectly clear that the testator meant otherwise (*Jesson* v. *Wright*, 2 Bligh 1, Sug., Property in H. of L. 250; *Doe* d. *Cole* v. *Goldsmith*, 7 Taunt. 209). Lord St. Leonards is of opinion that the power in such a case may be exercised in favour of any of the objects of the power within the line of perpetuity. Although, in strictness, the words "heirs of the body" mean one person only at any given time, yet they also comprehend all the posterity of the donee in succession, and the donee, therefore, could not strictly and technically appoint to "heirs of the body" (2 Bli. 53; Sug. Pow. 675).

Power exerciseable.

Remainder to the heirs of the body of A. as he shall appoint in personalty.

Words which would create an estate tail in realty will give an absolute interest in personalty, but in order to do so the words must be clear and distinct; and, moreover, not every form of expression which will create an estate tail in realty, will create an absolute estate in personalty (*Forth* v. *Chapman*, 1 P. W. 663). The principle is, that if the testator uses technical words which indicate a clear meaning that the property should go in a course of devolution until there is an exhaustion of the heirs of the body, as that cannot be carried into effect, they give an absolute interest (*Ex parte Wynch*, 5 D. M. & G. 206).

Direction for

In *Re Jeaffreson* (2 Eq. 276), a testator gave the residue of his

maintenance of and division among the heirs.

estate, consisting wholly of personalty, to trustees on trust for A. for life, and after her death "for the benefit of the heirs of the body of A., first to educate at their discretion the said heirs, and lastly to pay to the said heirs the said residue at their respective ages of 21, in such proportions as A. might by deed grant or by will direct." This was held not to be an absolute interest in A. V.-C. Wood said that upon such a gift of personal estate as that, the question was not whether the construction of the clause, taken simply word by word, would give an estate tail, but whether, regard being had to the whole will, considering that the property was personal and not real estate, there was an intention manifested that the words "heirs of the body" should be used in their proper sense. "Without pausing to consider whether the set of words used here would bring this case within the rule in *Shelley's case*, regard being had to the decision of House of Lords in *Jesson* v. *Wright*, I think the use of words like these, when accompanied with a discretionary power of education for these heirs of the body, and with an express discretion for division at 21, justifies me in saying that the testator did not point to heirs *successivè*, who are to continue proprietors of the fund in question to an extent which the law would not allow, and which the law would cut short by giving the fund to the first taker."

"Issue."

The word "issue" in a will *primâ facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation; but this *primâ facie* construction will give way if there be on the face of the will an intention that the word is to have a less extended meaning (*Slater* v. *Dangerfield*, 15 M. & W. 263). Where in a devise there is a gift over on general failure of issue, it is presumed that the word "issue" has been used by the testator as meaning heirs of the body; and it is for the party seeking to give it a meaning other than that which it frequently bears, to show clearly from the context of the will that the testator intended to give it a different meaning (*Roddy* v. *Fitzgerald*, 6 H. L. C. 823). In that case lands were devised (in 1817) to A. for life, and after his death to his lawful issue, in such manner, shares, and proportions as he by deed or will

should appoint, and for want of such appointment to the issue equally, and on failure of issue to B. The testator had in effect two intentions: one, that the gift over should not take effect till all the issue of the first taker was exhausted: the other, that the issue should not take in the ordinary course of descent. Of these the latter intent was obliged to give way, and the power of appointment did not vary the case, as it only showed that the testator did not contemplate equality of interests as essential (pp. 872-3).

Secus, if there be a gift to issue, either express or implied, coupled with words of distribution.

But in every case, however general the words may be, they may be restrained and limited by the context, whenever it clearly appears that they were intended to be used in a more restricted sense. Thus, if there are words of distribution, together with words which would carry an estate in fee, attached to the gift to the issue (whether such gift be express or implied), the ancestor will take an estate for life only. It is the vesting of the fee in the issue, and not the words by which it is vested, that prevents the necessity of implying the estate tail in the parent for the purpose of carrying out the intention that the estate should not go over till the exhaustion of the particular line. In such case, no estate tail is to be implied in the parent, but the fee is to be considered as vesting in the issue, whether the words giving the fee are direct words of limitation, as "to the issue and their heirs," or whether the fee can be held to be vested in them from the use of such expressions as "estate," or the like, or by implication from a power to appoint the fee to them (*per* Crompton, J., in *Roddy* v. *Fitzgerald* (6 H. L. C. 855). In *Bradley* v. *Cartwright* (L. R. 2 C. P. 511) the devise (in 1806) was to A. for life, with remainder to trustees to preserve, and after A.'s death "to the use of all and every the issue child or children of the body of A., in such shares and proportions, manner and form as A. should appoint: and in default of such issue" (not in default of appointment) over. A. was held to take an estate for life only, with a power of appointment superadded.

As to the use of the word "issue" as a word of limitation and otherwise, see Vaughan Hawkins, 189; Theobald, 3rd ed. 308; 2 Jarm. 4th ed. 438.

4. In cases where it is clear that a gift for life with a superadded power is intended, it is often difficult to decide whether such superadded power is intended to be exerciseable by instrument *inter vivos*, or only by will. The authorities are conflicting, but the rule to be extracted from them appears to be that—

Power after life estate, whether exerciseable by deed, or by will only.

A power to A. to appoint real or personal estate after his own death is not rendered testamentary only by the mere reference to his death (Sug. Pow. 210).

In *Anon.* (3 Leon. 71), there was a devise to A. for life, "and, after her decease, she to give the same to whom she would." This was held well exercised by a grant of the reversion in A.'s lifetime. On this Lord Ellenborough remarks (10 East, 443) that the word "give" might import something of which the party was to divest herself presently.

In *Re David* (Johns. 495), there was a residuary bequest to a *feme sole*, "to be by her possessed and enjoyed absolutely during the term of her natural life, and to be disposed of as she shall think fit at her death." The V.-C. said that, there being no such words as by will, and no indication of an intention to tie up the property, but rather the contrary, he should not be justified in construing the power as testamentary only.

In *Tomlinson* v. *Dighton* (1 P. W. 149), the devise was to the testator's wife for life, "and then to be at her disposal, provided it be to any of her children, if living;" and this power was held to be exerciseable at any time.

In *Ex parte Williams* (1 J. & W. 89), the testator gave all his real and personal estate to his wife for her life, "to be by her divided according to the best of her judgment amongst such of her children as should be surviving at the time of her decease." This was held to be a power exerciseable by deed or will.

In *Humble* v. *Bowman* (47 L. J. Ch. 62), a testator devised a house, and gave all his personalty, to his wife "for the term of

her natural life, and to be distributed to the testator's family at her decease, as she might think proper." V.-C. Hall held that the wife's power was not testamentary only.

In *Re Jackson's Will* (13 Ch. D. 189), there was a gift of the residue to A. for her sole use and benefit, should she outlive her uncle and aunts, "the whole principal at her death to be divided amongst her children, if she has any, in such proportions as she shall think proper; and if she dies without leaving children," then over. A. survived her uncle and aunts, but never exercised the power. It was held that her children took vested interests in the property, liable to be divested by the exercise of A.'s power, either *inter vivos* or by will.

On the other hand, in *Freeland* v. *Pearson* (3 Eq. 658), a testator gave his wife all his property for her sole use during her life, and directed her to pay his debts, &c., "and at her decease to make such a distribution and disposal of all my then remaining property among my children as may seem just and equitable according to her best discretion and consideration." The Master of the Rolls held that the power could be exercised only by will in favour of children who survived the donee; (and see the same Judge's decision in *Reid* v. *Reid*, 25 B. 469).

In *Kennedy* v. *Kingston* (2 J. & W. 431), there was a bequest to A. for life, "and at her decease to divide it in portions as she shall choose to her children." It was held that the children who were living at her death were the only objects of the power, and were, as such, entitled to a share lapsed by the death of a child to whom it had been appointed.

In *Archibald* v. *Wright* (9 Sim. 161), a testator willed that at the death of his wife £1,000 be transferred "to J. G. (a *feme sole*), for her sole and entire use during her life: that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease she may dispose of it as she thinks fit." This was held to give a life interest with a testamentary power. The Vice-Chancellor considered the restraint on alienation indicative of an intention to prescribe the mode of executing the power, viz., by will, and not by writing *inter vivos*.

And where there are words expressly referring to testamentary disposition, an exercise *inter vivos* is precluded.

"Leave."

In *Doe* d. *Thorley* v. *Thorley* (10 East. 438), there was a devise of lands to A. for life, "and also at her disposal afterwards to leave it to whom she pleases." The Court thought that the word "leave" must be taken to apply to that sense of it in which a person making his will would naturally use it, namely, by a testamentary disposition; and held, accordingly, that the power was exerciseable by will only.

In *Walsh* v. *Wallinger* (2 R. & M. 78), the testator devised his real estate to trustees upon trust to convert, and pay the proceeds to his wife to and for her own use and benefit and disposal, trusting that she would thereout provide for and maintain his family, "and at her decease give and bequeath the same to her children" by him as she should appoint. The power was held to be testamentary only.

In *Paul* v. *Hewetson* (2 M. & K. 434), where consols were given to trustees, upon trust to pay the interest to the testator's daughter for her separate use during her life, "the principal to go to her heirs, or to any other person she might choose to will it to," the decision was to the same effect.

Indicia of intention not to give absolute interest.

5. A gift over in default of the exercise of the power affords evidence of an intention to create a power and not to give an absolute interest (*Re Maxwell*, 24 B. at pp. 250-1): but on the terms of a residuary gift in that case Lord Romilly thought that there was no gift of the subject-matter of the appointment. So, the fact that the power of appointment is among a class; or that the donee is under some disability which the donor cannot remove, is said by the same judge to afford evidence of a like intention. But in *Healy* v. *Donnery* (3 Ir. C. L. R. 213), a testator devised to his daughter M. H. all his freehold interest in North King Street upon trust for her own separate use during her life, "with power to my said daughter by any deed or will to dispose of, devise, or bequeath the said freehold estate to and among her children in such shares and proportions as she shall think fit." There was the following residuary gift: "I do

hereby give leave and bequeath to my said daughter M. H. all the rest residue and remainder of my worldly substance of what nature or kind soever for her own sole use and benefit." It was held that M. H. took by force of the life estate and the residuary gift an absolute estate in the freehold, and not a mere life estate with a power of appointment among children and a gift by implication to the children. (*Sed qu.*, the Court evidently regarded the claim against M. H. as a dishonest one; see p. 217; and see Sug. Pow. 591.)

6. Again, if there be a plain reason for the creation of a power and a life estate in certain events, and an intention that in case such events do not arise the donee's interest shall be absolute, the Court will give effect to such intention.

Life estate severed from reversion in order to introduce contingent estates.

Thus, where the estate for life is severed from the power of disposing of the reversion for the purpose of introducing other distinct and separate contingent estates, then if such contingent estates do not arise, the donee is presumed, in the absence of other evidence of intention, to be intended to take not a mere life estate with a power of appointment, but absolutely.

In *Re Maxwell* (24 B. 246) there was a gift to A. for life, and after his death to his children, but in default of children, "one-half was to be disposed of as A. should think proper." The Master of the Rolls said that in this case there was a reason for giving the life estate, for the purpose of introducing the subsequent gift to the children, and he held that there being no children, and the son having died without appointing, the fund went to his personal representatives as part of his estate.

In *Goodtitle* v. *Otway* (2 Wils. K. B. 6) the devise was to the testator's heir-at-law for her life, and after her death for her lawful issue, but if she should have no issue, then that she should have power to dispose thereof at her will and pleasure. She died without issue. The Court held that she took an estate in fee-simple by the will, as the contingent remainder to the issue never vested: that the testator, by giving her power to dispose thereof at her will and pleasure in case she had no issue, had given her a fee-simple; and accordingly a will made by her during coverture was held void; (and see *Nowlan* v. *Walsh*, 4 De

G. & Sm. 584), where it is said: "When property is given to a person for life, and after his death to be at his disposal, it is difficult or impossible to give the legatee more than a life interest, because no reason can be suggested for the limitation of a life interest, except that the testator intended to give no more than a power beyond that limitation. But where the will is such that an intention to give a life estate, and an intention to give an estate afterwards may rationally be supposed to co-exist, the same reasoning does not apply." In that case, the testator directed his property to be placed in the funds, and the income to be paid to his wife; after her death he bequeathed two legacies, and the remainder of his property he left at the disposal of his wife if she remained a widow. If she should marry she was to have no control over his property, but the executors were to pay her an annuity for life, and the remainder was in that case given over. The widow did not marry again, and died without executing her power. The property passed to her representatives as part of her estate; (and see Sug. Pow. 105, 108).

Absolute gift followed by words sounding like power.

7. Where there is an absolute gift, whether of realty or personalty, followed by words sounding like a power, whether general or limited, with a gift over if it be not exercised, the gift over is repugnant and void (*Holmes* v. *Godson*, 8 D. M. & G. 152; *Gulliver* v. *Vaux*, *ibid.* 167; *Lightburne* v. *Gill*, 3 Bro. P. C. 250).

This is an offshoot of the general rule of law, that a gift over in the event of the death or intestacy of the person to whom an absolute interest is given, is repugnant and void.

In *Holmes* v. *Godson*, a testator gave real and personal estate on trust for his son, to vest in him on his attaining 21, but if he should die under 21, or having attained 21, *should not have made a will*, the testator directed the property to be sold, and the proceeds held on other trusts. The gift over was held void. L. J. Turner

said that, the law having declared that if a man dies intestate his real estate shall go to his heir, and his personal estate to the next of kin, any disposition which tends to contravene that disposition which the law would make, is against the policy of the law, and therefore void; (see, too, *Comber* v. *Graham*, 1 R. & M. 450; *Watkins* v. *Williams*, 3 Mac. & G. 622; *Re Wilcock's Settlement*, 1 Ch. D. 229; *Shaw* v. *Jones-Ford*, 6 Ch. D. 1; *Re Percy*, 24 Ch. D. 616; *Re Parry and Daggs*, 31 Ch. D. 130).

In *Gulliver* v. *Vaux*, a testator devised real estate to his second son in fee, if he attained 21, charged with a legacy to a daughter, and if the second son died under 21, then to the eldest son when he attained 21, charged with the legacy; and in case it should happen that all the testator's three children should die without issue and without appointing the disposal of the estate, then over. The devise over was held repugnant and void.

In *Barton* v. *Barton* (3 K. & J. 512), there was a gift to J., T., and M. of all the testator's freehold, leasehold, and other property, share and share alike. As to M.'s share, he declared that she should receive the interest only during her natural life, and that after her death her share should be divided among her children at 21. But if she should have no children, or if they should die under 21, her share was to go to J. and T. "But *in case J. and T. should either or both die intestate, his or their share or shares should be divided between their children respectively, share and share alike.*" The last gift over was held repugnant and void.

In *Re Mortlock* (3 K. & J. 456), there was a bequest to two persons in two equal parts, each for his and her own sole use and benefit, and to be disposed of as each of them pleased at their deaths; or if not so disposed of, to be equally divided at their deaths between their children. This was held to be an absolute gift, and the gift over was rejected as repugnant; (and see *Re Yadden*, 1 D. M. & G. 53).

In *Hales* v. *Margerum* (3 Ves. 299), a testator gave £1,000 stock to A., a married woman, for her separate use; "and whenever she shall happen to die, the said £1,000 shall be absolutely

in her own power to dispose of, by her last will and testament, to any person or persons she shall think proper," with a gift over on failure of disposition by her. It was held that she took an absolute gift of the £1,000, qualified only so as to prevent her husband taking as administrator on her death, and that the sum therefore passed under general words of gift in her will.

In *Bull* v. *Kingston* (1 Mer. 314), there was a gift of personal property in trust for A., a married woman, for her separate use, with a power of disposing of it by will, except to certain specified persons; "and in case she dies without a will, I give all that may remain at her decease to" B.; followed by a gift of "all the rest and residue" to A., who was appointed executrix. It was held that A. took absolutely, with power for her, though married, to dispose of her interest by will: that the gift over to B. was repugnant and void; and that all that A. did not dispose of passed to her husband.

There may, however, be cases in which, as a matter of construction, the absolute gift in the first instance is cut down by subsequent express words, as in *Ahearne* v. *Ahearne*, 9 L. R. Ir. 144.

If the power be exercisable by will only.

V.-C. Wood, in *Re Mortlock*, expresses a doubt whether the construction would be the same if the exercise of the power had been required to be by will, or whether the bequest would not be cut down in such a case to a life interest in the donee, with a power to appoint by will.

The case of *Borton* v. *Borton* (16 Sim. 552) appears to afford ground for the doubt. In that case the testator gave to B. all his personal estate and effects, the same to be considered as vested in her on her attaining 21, and to be subject to her disposition thereof; and, by a subsequent clause, he gave the property over, in case B. should die under 21, or without disposing of the property *by her will*. This was held to create a life interest with a testamentary power of disposition. L. J. Turner (8 D. M. & G. 166) considered that this case proceeded entirely on the particular words of the will, the words "to be subject to her disposition thereof," meaning to be subject to her testamentary disposition, and referring to the ulterior power of

testamentary disposition given to her. *Sed qu.* In *Hixon* v. *Oliver* (13 Ves. 108), there was a bequest to the testator's wife of £60 a year for life, and "£300 to be disposed of as she thinks proper, to be paid after her death." This was held an absolute gift, the Lord Chancellor saying that, as a power is a restraint upon property, it is never to be implied. In *Weale* v. *Ollive* (No. 2) (32 B. 421), the testator, by his will, dated 1840, made an indefinite gift of personalty to a class of children equally, with a declaration that they should have the right to will away their shares on their death, and a gift over, if they should omit to make their wills. The gift over was held repugnant. The Master of the Rolls said that a right to will is an incident to and belongs to an absolute interest, and cannot be treated as a power. When an absolute interest is given, then the right to dispose of it by will is incidental to that estate, and not a power attached to it.

In *Robinson* v. *Dusgate* (2 Vern. 181), a testator devised his lands to A. for life, with remainder to B. in fee, he paying £400, whereof £200 was "to be at the disposal of his wife in and by her last will and testament to whom she shall think fit to give the same." It was held that the whole interest and property in the £200 vested in the wife, and that on her death intestate, it passed to her administrator (and see *Southouse* v. *Bate*, 16 B. 132; *Elton* v. *Sheppard*, 1 B. C. C. 532).

In *Doe* v. *Glover* (1. C. B. 448), there was a devise in fee, and in case the devisee should not have parted with or disposed of the same, then over. The Court seems to have proceeded on the ground that the devise over was not repugnant to, or inconsistent with, the prior devise. The testator's intention was held to be that, unless there was a parting with, or disposition of, the estate by deed in the lifetime of the first devisee, the devisees over would take. This case and that of *Borton* v. *Borton* are perhaps of doubtful authority; and in the latter the attention of the Court seems hardly to have been called to the point, that the devise over, as it was construed, took away the testamentary power which was incident to the fee first devised (see *per* L. J. Turner, 8 D. M. & G. 165—167).

Distinction between realty and personalty, *qu.*

It seems that there may be some distinction between real and personal property in this respect. It might be regarded as a gift of the real estate, and a direction that if something was omitted to be done before a particular time, the estate should go over (32 B. 425), *sed qu.*

In *Doe* v. *Thomas* (3 Ad. & Ell. 123), a devise to A., her heirs and assigns for ever, with the intention that she may enjoy the property during her life, and by her will dispose of it as she thinks proper, was held to pass the fee; the additional words being considered as merely explanatory of the devisee's dominion, although the same will contained a devise in fee to another person without the addition of any such words.

But, of course, a devise to A. *for life*, with remainder to his appointees by deed or will, does not vest property in him, although it gives him an absolute power over it which he may exercise in his own favour if he pleases. It must also be remembered that a power can co-exist with the fee (*ante*, p. 38), and it is immaterial in what part of a deed powers are inserted, whether before or after estates created (*R.* v. *Inhabitants of Eatington*, 4 T. R. 177).

Hence the addition of a power to an estate is not necessarily void, although it was so decided in *Goodill* v. *Brigham* (1 B. & P. 192), where there was a devise to a *feme coverte* in fee, with a power of disposition superadded, and it was held that the power was void as repugnant to the fee. This decision cannot, however, be considered good law (see Sug. Pow. 94—98).

Power of sale in executors distinguished from estate.

8. Questions of considerable difficulty often arise with regard to the power of executors to sell land; and although these questions have, to some extent, been simplified by legislation, such legislation has itself given rise to further questions. If there be a direct devise to executors, they take the estate and not a mere power; but if there be no such devise, but a mere direction to sell, they take a mere power and no estate.

Powers of sale in executors.

A devise of land to executors to sell passes an estate; but (i.) a devise that executors shall sell

the land; or (ii.) that land shall be sold by the executors; or (iii.) a devise of lands to be sold by the executors, creates only a power (Sug. Pow. 111—115; Chance, pl. 141—170).

The third proposition is, however, open to doubt (see Co. Lit. 113 a).

In *Doe* v. *Shotter* (8 Ad. & Ell. 905), there was a devise of freeholds to the testator's wife for life; and after her death "my will is that my said freeholds shall then be sold by my executors in trust," &c. The Court construed this as a devise that the lands should be sold by the executors, and accordingly held that they took a mere power.

In *Reg.* v. *Wilson* (3 B. & S. 201; 9 Jur. N. S. 439), a testator directed his executors to sell copyholds, and to convey and assure them to the purchaser. It was contended that the direction to convey showed that the executors were intended to take an estate; but the Court held that they took a mere power, and could accordingly complete a sale without being admitted. It will be remembered that a bargain and sale is still a common form of assurance of copyholds by executors who have a power of sale, but no estate; and the executors were therefore able to convey in the ordinary way as directed by the will. The report of this case in 11 W. R. 70, must be erroneous in stating that the testator bequeathed his copyholds to his executors.

In *Lancaster* v. *Thornton* (2 Burr. 1027), a testator devised that his sons should sell his real estate. This was held to be a power, *devise* being equivalent to *direct;* (see, too, *Knocker* v. *Bunbury*, 6 Bing. N. C. 306).

9. Such a power as is mentioned in the preceding rule may be created without express words, and although no donee be named; and will enable the person who exercises it to pass the legal estate. How created, and operation of.

If there is a direction to sell in a will, but the testator does not say by whom the sale is to be Direction to sell and no vendor named.

made, the executor is presumed to be intended, unless a contrary intention appear from the will.

In *Anon.*, Dyer, 371 b. (S. C. *sub nom. Milward* v. *Moore*, Sav. 72), A. devised all his estates to his sister and her heirs, "except out of this general grant my manor of X., which I do appoint to pay my debts;" and made two executors by name. It was held that the executors had power to sell X. for payment of debts. It will be observed that there is here no express direction to sell, but a particular estate is charged.

In Vin. Abr. tit. Devise (Q. e. pl. 1): Devise of lands to be sold for payment of his debts; it shall be sold by his executors; and the naming of his executors is sufficient (see, too, *Newton* v. *Bennet*, 1 B. C. C. 135; *Elton* v. *Harrison*, 2 Sw. 276, n; *Wareham* v. *Brown*, 2 Vern. 154).

And Lord St. Leonards (Pow. 117) says that it is well settled that the executors, where no contrary intention appears, shall sell, as well where the money is to be applied for payment of debts, as where it is given in the nature of legacies and is distributable by the executors. Thus, in *Carvill* v. *Carvill* (2 Ch. Rep. 301), A. gave legacies, which he appointed to be paid by sale of lands, and appointed executors; and the Court decreed that the lands should be sold by the executors. In *Allum* v. *Fryer*, however (3 Q. B. 442, 446), Lord Denman said that if lands were directed to be sold, and the money arising from the sale were placed in a course of distribution within the province of the executor, then the executor would have the power of sale; but if (as in that case) it was to be distributed only amongst certain persons, the heir would have the power.

In *Bentham* v. *Wiltshire* (4 Madd. 44), a testator bequeathed lands to H. B. for life, provided she did not marry, and directed, "after her decease, the estate should be sold" (not saying by whom), and the money divided amongst certain persons named, after paying to G. B. a legacy of £5, and he appointed H. B. (the tenant for life) and B. B. his executors. It was held that no power of sale was given to the executors, as they had nothing

to do with the produce of the sale, nor any power of distribution with respect to it; and there was the further circumstance that the sale was directed to be made after the death of the tenant for life, who was one of the executors; (but see *Ward* v. *Devon*, mentioned in *Forbes* v. *Peacock*, 11 Sim. 160; *Curtis* v. *Fulbrook*, 8 Ha. 25, and S. C. 278—280; and *Anon.* 2 Leon. 220, pl. 276, referred to in Sug. Pow. 115).

In *Ward* v. *Devon* (cited 11 Sim. 160), the will was: "Sell all off, both real and personal property, and divide the produce between my wife M. A. W. and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but it is my will to sell all. I appoint R. W. and my wife M. A. W., my executors." That was the whole will, and the executors were held to take a power to sell. In both these cases the produce of the sale was not distributable by the executors as such; and it is difficult to maintain, in the face of *Ward* v. *Devon*, that the decision in *Bentham* v. *Wiltshire* was right on the first ground stated by the Vice-Chancellor. But in other points the cases are very distinguishable. In *Ward* v. *Devon* the sale was immediate, and real and personal estate were treated together, whilst in *Bentham* v. *Wiltshire* the inconvenience of a sale postponed till the death of the tenant for life, who was also executor—postponed, that is, to a period possibly remote, when all other proceedings in relation to the estate would have been long completed, and the executors would be *functi officio*—must have had some weight; (and see Sug. Pow. 119; see, too, *Pit* v. *Pelham*, 1 Ch. Ca. 176; 1 Lev. 304; Sug. Pow. 116; Chance, pl. 187).

Conflict between *Bentham* v. *Wiltshire*, and *Ward* v. *Devon*.

When the intention of testators, as expressed in their wills, is to be the criterion, it is evident that each case must depend on its own circumstances, and it is probable that *Bentham* v. *Wiltshire*, on all the circumstances of the case, would be decided in the same way at the present day; but the fact that the distribution of the produce of sale was not necessarily entrusted to the executors *virtute officii* would be considered only as one point of evidence, and not as the sole ground of the decision.

In neither of the preceding cases was there any devise in fee

If there is a devise of

lands, a direction to sell gives no power to executors.

of the land to be sold. If the land is devised direct to several in fee, with a direction superadded that it shall be sold, there is no implied power of sale in the executors, although the devisees are minors. The evidence of a contrary intention afforded by the devise is too strong (*Patton* v. *Randall*, 1 J. & W. 189, 196). But this would not apply to cases where the devise is merely of a life estate, and after the death of the life-tenant to be sold, as in *Bentham* v. *Wiltshire*.

Realty and personalty blended into one fund.

In *Tylden* v. *Hyde* (2 S. & S. 238) the fact that the produce of the sale of realty and conversion of personalty was treated as blended into one fund, was held sufficient evidence of intention to give the executors the power.

Power of executors is question of intention.

10. The power of executors, however, to sell real estate does not depend on any express direction that the estate shall be sold: but if from the whole purview of the will it appears to have been the intention of the testator that his real estate should be sold, and the proceeds are to be distributed in such a manner as the executors alone can by law carry out, then there is an implied power given to them to sell the estate. The implication that the executors are to take the power arises from the fact that the money is to pass through their hands and to be distributed by them in the execution of their office, as in payment of debts and legacies; or it may be otherwise raised by evidence of intention on the face of the will. But it is not enough to show that it would be more expedient to have the sale made by the executors than by the heir-at-law (*per* Parke, B., in *Doe* v. *Hughes*, 6 Ex. 223).

Thus, it appears that the subdivision of real estate into shares, with directions for the investment of some of the shares, will give the executors a common law power, if the real estate be not directly devised to any person.

A mere division without more would not probably be enough. The distinction between a devise to A. and B., to be divided between them in equal moieties (in which case A. and B. would take the fee in moieties), and a devise of real estate to be divided between A. and B., or between any number of persons, seems too slight to found any argument upon (*cf.* *Stevenson* v. *Mayor of Liverpool*, L. R. 10 Q. B. 81); but if such a

devise as the last were coupled with directions as to the investment of some of the shares, and other evidence of an intention to convert, it seems that the testator will be considered to have given his executors a common law power to sell the realty.

Sub-division of property into numerous parts, and directions as to investment.

In *Mower* v. *Orr* (7 Ha. 473), the testator prefaced his will with a statement that his property was so scattered about and not realized that he could not tell what he should die worth; he then gave his estate, including copyholds of inheritance, leaseholds, merchandize, money in the funds, and cash, to his children and grand-children in twenty aliquot shares, and directed two of such shares to be invested in the names of his executors in Government funds for the benefit of two of the legatees, who were infants; the will concluded with a request to his executors, that they would, on his death, use their exertions to get his property together, and divide it according to his intentions therein expressed. The Vice-Chancellor said that the division of the entire property into a number of shares, and the direction contained in the will as to the investment and disposition of some of such shares, precluded the supposition that the testator intended that the copyholds should remain unsold; and he held that the testator had directed a conversion of all his real estate. This implied that the executors took a common law power of sale. The testator had, in fact, directed a sale without saying by whom it was to be made; this (by the rule above stated) would give the executors power to sell, even without the blending of realty and personalty into one fund, and the direction as to the investment in the executor's names.

On the other hand, in *Cornick* v. *Pearce* (7 Ha. 477), the testator gave his real and personal estate to trustees on trust, to apply the rents for his daughters' benefit until the youngest attained 21; and then to divide the whole into two equal moieties, of which he gave one moiety to his two daughters absolutely, and directed the other to be invested in Government or real securities, and the dividends to be paid to the daughters for life, and on their death the said moneys and effects to be divided amongst their children. The same Vice-Chancellor thought that a mere division of real estate into moieties, and a

direction as to the investment of one moiety, did not necessarily operate as a conversion of more than one moiety; the direction to invest arose out of and was rendered necessary by the settlement of the property which the testator had in view; the property was to be enjoyed in specie, and at a certain period there was to be a division of one moiety between the two daughters, the other moiety was to be invested; if the testator had said that one moiety was to be sold for the purposes of investment, the case against the conversion of the other moiety would have been too clear. He thought that there was no direction which required a conversion except as to the moiety to be settled.

It has been said of the case of *Mower* v. *Orr* (1 Jarm. 3rd ed. 558), that it seems to go little short of deciding that every direction to divide implies also a direction to convert into money, for the purpose of rendering the division more easy. It is, however, to be observed that the will in that case contained a direction for investment, and peculiar expressions, showing an intention to convert, apart from the division into shares, *e. g.*, the recital that the property was *not realized*, implying a desire that it should be realized, and the desire that the executors would *get his property together* and divide it.

The question must depend upon the wording of each particular will. If, upon the whole language of the will, for effecting the purposes of the will, it is plain that there was to be a division of the property; that the property to be so dealt with is to go—not the land in specie, and the money in specie—but to go among certain persons in certain shares and proportions, without any distinction as to land or money; then, if the purposes of the will can be best effected by a conversion, and there be no devise, it seems that the executors will take a common law power to effectuate the purposes of the will; (*cf.* the judgment of V.-C. Stuart, in *Greenway* v. *Greenway*, 29 L. J. Ch. 603; reversed, *ibid.* 605; 2 D. F. & J. 128; and see *Lucas* v. *Brandreth*, 28 B. 273; *Davies to Jones*, 24 Ch. D. 190; *Flux* v. *Best*, 23 W. R. 228; *Buchanan* v. *Angus*, 4 Macq. 374; *Nixon* v. *Cameron*, 26 Ch. D. 19; *Re Cookes*, 4 Ch. D. 454; and as to

the implication of a receipt clause, see *Balfour* v. *Welland*, 16 Ves. 151).*

Completion by executors or administrators of contract to sell realty.

11. It may here be noted that under the Conveyancing Act, 1881, sect. 4, where, at the death of any person dying after 31st December, 1881, there is a subsisting contract enforceable against his heir or devisee for the sale of the fee simple or other freehold interest, descendible to heirs general, in any land, his personal representatives have power to convey the land for all the estate and interest vested in him at his death in any manner proper for giving effect to the conveyance. This section enables the legal personal representatives to convey the legal estate if vested in the testator in freeholds: if the legal estate is outstanding the section has no operation, but it appears to override a devise by the testator to trustees or any other person. The section does not extend to copyholds.

12. The intention of the testator that the executor should take a power of sale over his real estate is sufficiently shown by his charging that estate with the payment of his debts.

Direction to pay debts operates as charge.

A mere general direction by a testator that his debts shall be paid effectually charges them upon all his real estate.

A mere direction to adjust and pay all claims is not, however, sufficient (*Re Head and Macdonald*, 45 Ch. D. 310).

* By the courtesy of the late Mr. Dart, I am permitted to insert his opinion on the following case. The will, so far as material, was as follows:—"Fourthly, upon the decease of A., I give, devise, and bequeath all the rest and residue of my real and personal estate, to be divided into four equal shares, between B., C., D., and the children, or survivors of them, of E., namely, F., G., and H., their one-fourth share to be equally divided amongst them, and to be *paid* on their severally attaining their majority; but in reference to C.'s one-fourth share, it is my express will and desire that the same shall be *by my executors invested* in good and proper securities, and that the interest arising therefrom shall be paid to him in quarterly instalments, and in case of the demise of either or any of the above-named parties, the deceased's share to be equally divided amongst the survivors in the respective portions."

Mr. Dart thought that although the mere division into shares would not have been enough to turn what he should otherwise read as a devise into a mere power, yet as there was a direction to *invest* and *pay* in the will, he thought that the executors took *ex officio* a common law power.

The rule applies whether the real estate be devised to the executors or not, and whether the testator effectually disposes of his real estate or dies intestate with respect thereto (*Shallcross* v. *Finden*, 3 Ves. 739).

How far generally a charge is limited by express limited charge.

13. Such general charge is not necessarily inconsistent with a subsequent express charge of specific sums upon a particular estate (*Taylor* v. *Taylor*, 6 Sim. 246; *Forster* v. *Thompson*, 4 Dr. & War. 303), nor even of all the debts upon a particular estate (*Graves* v. *Graves*, 8 Sim. 43); and it may be stated generally that such subsequent specific charge without more is not enough to limit the generality of the preceding charge. The testator can, however, of course except some of his estates from the charge, either expressly (as in *Thomas* v. *Britnell*, 2 Ves. sen. 313), or by implication; and it has been held that a subsequent direction that the debts are to be paid out of a particular estate has this effect (*Douce* v. *Torrington*, 2 M. & K. 600, *sed qu.*)

There is no inconsistency in creating two funds for the payment of debts. In *Price* v. *North* (1 Ph. 85), a testator began by directing payment of his debts, and then gave the residue of his personal estate (after and subject to the payment of his debts and legacies) to his daughter. The Court held the real estate charged with the debts in aid of the personalty. But it is a question of intention in each case. Thus, in *Palmer* v. *Graves* (1 Keen, 545), the Master of the Rolls said: "The testator commences his will by saying, 'In the first place, I direct my just debts, funeral expenses, and the charges of proving this my will to be fully paid.' These words, if not limited or controlled by anything else in the will, are sufficient to constitute a charge on all the real estates for the payment of debts: not a clear, express charge on all the testator's lands, but a charge by implication, capable of being explained by subsequent words or a subsequent provision for the payment of debts. The testator, after employing the words I have stated, proceeds to make several devises and bequests, and then gives and bequeaths unto John Graves a small quantity of silver plate, together with the rents and profits of his freehold and leasehold premises, due

and accruing up to what is termed a quarter-day, which should ensue next after his death, *which rents and profits I charge with the payment of my said debts, funeral expenses, and the charges of proving this my will.*" And he held that the general charge was controlled by the specific charge.

Direction that debts be paid by executors : (i.) Where no estate is devised to executors.

Where, however, the direction that the debts shall be paid is coupled with a direction that they shall be paid by the executors, then, if no real estate is devised to the executors, it is assumed that the testator intended that the debts should be paid only out of property which by law passes to the executors, and therefore no charge of debts on the real estate is created (*Wasse* v. *Heslington*, 3 M. & K. 495; *Keeling* v. *Brown*, 5 Ves. 359; *Wisden* v. *Wisden*, 2 Sm. & G. 396).

In *Re Cameron*, *Nixon* v. *Cameron* (26 Ch. D. 19), a testator gave legacies and annuities, and proceeded: "My executors may realize such part of my estate as they think right and in their judgment to pay the afore-named legacies." It was held by the Court of Appeal that this applied only to property which the executors took as executors. Lord Selborne (p. 25) says: "It was insisted that the words 'my estate' thus used comprehended real estate: as they no doubt might if a testator gave 'all his estate' to his executors or to any other devisees. But when an implication adverse to an heir-at-law is sought to be raised from a mere direction for payment of legacies, it is necessary to consider whether the words are not sensible without any such implication. The whole personal estate vests by law in the executors: the real estate does not. The personal estate, not specifically bequeathed, is generally the proper fund for the payment of pecuniary legacies. When a testator directs his executors to realize for the payment of such legacies, 'such part of his estate as they think right and in their judgment,' it is reasonable to understand him to refer to the estate which vests in them as executors, and not to that which does not: and the direction in the earlier sentence of the same will, that a particular legacy is to be paid out of his estate, naturally means that it is to be paid in a due course of administration." These

observations appear to apply with equal force to debts (see *Doe* v. *Milborne*, 2 T. R. 721).

(ii.) Where estate is devised to executors.

But if any real estate is devised to the executors, then it is assumed that the testator intended that his debts should be paid out of the personalty and the estate so devised, and the debts are charged on that estate accordingly (*Dover* v. *Gregory*, 10 Sim. 393). The law is thus stated by the late Master of the Rolls in *Tanqueray-Willaume* v. *Landau* (20 Ch. D. at p. 479): "A direction to 'my executors to pay my debts' has been held to mean a direction to them to pay out of the personal estate; but if it is followed by a devise of real estate to the executors either as such or in their own names, it is a direction to them to pay out of that estate as well as out of the personal estate, and the real estate is charged." And the same rule applies whether the devise is to the executors beneficially or in trust, and if the devise is in trust, it applies whether the executors take the whole beneficial interest, as in *Henrell* v. *Whitaker* (3 Russ. 343); or only a life interest, as in *Finch* v. *Hattersley* (3 Russ. 345); or an estate tail, as in *Clowdsley* v. *Pelham* (1 Vern. 411); or no beneficial interest at all, as in *Hartland* v. *Murrell* (27 B. 204) (*per* Fry, J., in *Bailey* v. *Bailey* (12 Ch. D. 268), approved by C. A., 20 Ch. D. 476). But it has been held that a direction that the debts shall be paid by the executor, coupled with a devise of real estate to such executor beneficially for life, will not enable the executor to sell the fee (*Cook* v. *Dawson*, 29 Beav. 123).

Devise to one of several executors only.

15. Where there is a direction to the executors to pay debts, and a devise to one or some only of the executors, the estate so devised is not charged (*Warren* v. *Davies*, 2 M. & K. 49; *Wasse* v. *Heslington*, 3 M. & K. 495; *Keeling* v. *Brown*, 5 Ves. 359). Nor is it charged if there are two or more executors, and the estates are given to them beneficially in unequal shares: the presumption that a testator, who directs payment of his debts by his executors, and devises real estate to such executors, imposes on them the duty of paying his debts to the extent of the estates devised to them, is said to be inapplicable to cases

where unequal benefits are given; and it has been held that, in such a case, the testator could not have intended them to bear his debts equally, and therefore that the real estate is not charged at all (*Harris* v. *Watkins*, Kay, 438). It may be doubted whether the conclusion is satisfactory: although it may well be that the testator did not intend devisees of unequal estates to bear his debts equally, he may well have intended them to bear the debts rateably according to value, as in the case of a devise to two persons of the equity of redemption of two estates subject to one mortgage. And the exception does not apply where the whole legal fee is devised to the executors, although they are interested beneficially in unequal shares (*Re Tanqueray-Willaume*, 20 Ch. D. 465).

Charge of debts creates power to sell.

16. A charge of debts by will coming into operation prior to the 13th of August, 1859, on real estate, gives the executors power to sell the real estate and to give valid discharges for the purchase-money (*Elliott* v. *Merryman*, 1 W. & T. L. C.; *Dolton* v. *Hewen*, 6 Madd. 9; *Ball* v. *Harris*, 4 M. & Cr. 264).

This rule also holds good in the case of wills coming into operation subsequently to the 13th of August, 1859, unless there is a devise of the testator's real estate for his whole estate or interest to trustees who are not the executors (see 22 & 23 Vict. c. 35, *post*).

This charge of debts affects the equitable but not the legal estate (*per* Lord Langdale, in *Shaw* v. *Borrer*, 1 Keen, 576). In that case (which was a suit for specific performance) the testator, after charging his debts on his real estate, devised his advowson of H. to J. K. S. and J. C. and their heirs on certain trusts for R. W. S., and subject thereto to sell, and he appointed J. K. S., R. W. S., and J. K. S. B. executors. Lord Langdale said that the Court would, in a suit by creditors to which the executors were parties, compel the trustees for special purposes

to raise the money requisite for payment of the debts, and that the trustees and executors might themselves do that which the Court would compel them to do, on the application of the creditors; and he held that the executors and trustees together could make a good title.

In *Hodkinson* v. *Quinn* (1 J. & H. 303), V.-C. Wood said: "In suits of specific performance of this kind, where there is a charge of debts, and no distinct provision as to the person by whom the sale is to be made, the executors take an implied power of sale for payment of debts, though the persons beneficially interested are capable of concurring; and where an attempt is made to resist a sale by them, the executors are entitled to insist on a conveyance of the legal estate."

In *Gosling* v. *Carter* (1 Coll. 644), the purchaser was held not bound to complete without the concurrence of the heir of the testator.

In *Robinson* v. *Lowater* (17 B. 592; 5 D. M. & G. 272), the question at issue was the power of the executor to give a valid receipt for the purchase-money of an estate charged with the payment of debts. The testator in that case devised three estates, viz., Rutland Place to A. for life with contingent remainders over, Sandfield to B. for life with like remainders over, and Arnold to B. in fee, subject to and charged with the payment of a mortgage of £200 secured on Rutland Place, certain legacies, and his just debts, &c.; and if Arnold should be insufficient, then he charged Sandfield with the payment thereof, and he appointed B. sole executor. B. sold Sandfield to a purchaser with notice of the will; the £200 mortgage debt was not paid out of the purchase-money, and the devisees of Rutland Place sought to make Sandfield liable thereto in the hands of the purchaser. The Master of the Rolls and the Lords Justices on appeal held that the testator evidently intended that the executor should sell, and the executor must therefore be considered as invested with all necessary powers, including a power to give receipts. It is to be observed that the question in this case was confined to the executor's power of giving receipts, and was raised by a *cestui que trust*. No question was raised by the

purchaser from the executor as to whether he obtained the legal estate.

It has been said that a title depending for its validity on the decision in *Robinson* v. *Lowater* would not be forced upon an unwilling purchaser (*per* L. J. Turner in *Cook* v. *Dawson*, 30 L. J. Ch. 360, 3 D. F. & J. 127). But see *Alexander* v. *Mills* (6 Ch. at p. 131), where it is said that, as a general and almost universal rule, the Court is bound as much between vendor and purchaser, as in every other case, to ascertain and determine as it best may what the law is, and to take that to be the law which it has so ascertained and determined. This, however, is qualified by the Court of Appeal in *Palmer* v. *Locke* (18 Ch. D. 381), and is restricted to cases where there are no serious grounds for doubt; (and see *Re Thackwray and Young*, 40 Ch. D. 34; 2 Dart, 1236).

It has been expressly decided at law that the executors under a power implied by a charge of debts could not convey the legal estate before 22 & 23 Vict. c. 35.

In *Doe* d. *Jones* v. *Hughes* (6 Exch. 223), a testator charged all his real and personal estate with payment of his debts, and died intestate as to one moiety. The Court held that a simple charge of debts did not give a common law power to the executrix to sell for their payment, but that any right the executrix might have must be enforced in equity; (see, too, *Kenrick* v. *Beauclerk*, 3 B. & P. 175; *Doe* v. *Claridge*, 6 C. B. 641).

It appears therefore that a simple charge of debts gives the executors an equitable power only, and that on a sale by them the purchaser is entitled to have the legal estate conveyed to him by the person in whom it is outstanding (see *per* Jessel, M. R., in *Tanqueray-Willaume* v. *Landau*, 20 Ch. D. 477). But see *Greetham* v. *Colton* (34 B. 615); and in *Eidsforth* v. *Armstead* (2 K. & J. 333), where, after a charge of debts, the devise was to the use of trustees during the life of A., and after her death to the use of her appointees by will, and in default of appointment, to the use of her right heirs, and the testator charged his estates with the payment of £700; it was objected that the purchaser did not get the whole legal fee, but the title was forced on the purchaser, the Vice-Chancellor saying that

the testator having charged his real estate with a sum of money, must be taken to have given an implied power of sale to some person to raise the sum required, and that the donee must be ascertained from the whole of the will. He does not touch on the difficulty that the purchaser did not get the whole legal fee.

And in *Wrigley* v. *Sykes* (21 B. 337), where there was, first, a charge of debts, then a devise to trustees for 500 years, and then a devise to five persons in fee as tenants in common, who were also appointed executors, it was held that 33 years after the testator's death the surviving executors could sell, and specific performance was decreed against the purchaser, although it appears that he could not get more than two-fifths of the fee; (see this case observed on, Sug. Pow. 121).

Purchaser not to inquire as to existence of debts.

17. A purchaser from executors selling under a power of sale created by a charge of debts is not bound, and ought not, to inquire whether there are debts or not, if such sale is made within a reasonable time after the testator's death.

This rule is, of course, inapplicable to a purchaser who has actual knowledge that all debts have been paid, and that the purchase-money is to be applied only for the vendor's own use and not for any purpose whatever connected with the estate; for instance, if it was to be taken in satisfaction of a previous debt, due from the executor himself to the purchaser (*per* Lord Hatherley in *Corser* v. *Cartwright*, L. R. 7 H. L. at p. 741, approving *Watkin* v. *Cheek*, 2 Si. & St. 199); but where the executors have a power of sale for other purposes (as for the payment of legacies, or for distribution among beneficiaries), the rule applies, though the purchaser is aware that all debts have been paid, or indeed that there never were any debts (*Forbes* v. *Peacock*, 1 Ph. 717; *Stroughill* v. *Anstey*, 1 D. G. M. & G. 635; *Carlyon* v. *Truscott*, 20 Eq. 348).

"When a testator by his will charges his estate with debts and legacies, he shows that he meant to entrust his trustees" (or

executors) "with the power of receiving the money, anticipating that there will be debts, and thus providing for the payment of them. It is by implication a direction by the testator that he intends to entrust the trustees with the receipt and application of the money, and not to throw any obligation at all upon the purchaser or mortgagee; that intention does not cease because there are no debts; it remains just as much if there are no debts, as if there are debts, because the power arises from the circumstance that the debts are provided for, there being in the very creation of the trust a clear indication amounting to a declaration by the testator that he means that the trustees are alone to receive the money and apply it. In that way all the cases are reconcileable and all stand upon one footing, namely, that if a trust be created for the payment of debts and legacies, the purchaser or mortgagee shall in no case be bound to see to the application of the money raised" (*per* Lord St. Leonards, 1 D. G. M. & G. 653).

Charge of scheduled debts or legacies only.

But if the trust or charge were for payment of certain scheduled debts only (*Doran* v *Wiltshire*, 3 Sw. 701), or of legacies only (*Johnson* v. *Kennett*, 3 M. & K. 630, *Horn* v. *Horn*, 2 S. & S. 448), the purchaser was bound to see to the application of the purchase-money (Lewin, 9th ed. 505); and of course the purchaser would in any event be liable if he colluded with the executor in a sale for an improper purpose, or with a view to a misappropriation of the purchase-money (*Eland* v. *Eland*, 4 M. & C. 427). In the absence of collusion, however, it is submitted that a direction to the executor to pay scheduled debts or legacies gives him power to sell real estate for the purpose as much as a direction to pay debts generally, although it is possible that it might be necessary to show that the legatee was alive, or that all the scheduled debts had not been paid in order to show the existence of the power; but the power to give a receipt for the purchase-money is now a statutory power, and if the power to sell is once established, and no collusion shown, it is submitted that (since 1860) the power to give receipts follows as incidental to the power of sale.

Sale by devisee who is

And the fact that the mortgage or sale is made by one of

one of several executors.

several executors, who is also devisee of the estate mortgaged or sold, does not prevent him from giving a valid receipt for the consideration money (*Corser* v. *Cartwright*, L. R. 7 H. L. 731). As the legal estate is devised to him, he is the proper person to convey, and (being an executor) he can also give a good receipt (*Colyer* v. *Finch*, 5 H. L. C. 905); but the purchaser's protection is independent of the possession of the legal estate (*ibid.*).

Lapse of time.

And the fact that a considerable time has elapsed since the testator's death does not affect the validity of the power, unless it be so great as to raise a presumption that all debts have been paid.

The Court of Appeal, in *Tanqueray-Willaume* v. *Landau* (20 Ch. D. 465), have laid down twenty years as the period within which a purchaser may properly presume that there are unpaid debts.

"There is no distinction between a devise of estates to executors, subject to a charge of debts with the implied power of sale which follows from it, and a trust for payment of debts where the legal estate is expressly devised to trustees for the purpose of making such payment. In the case of such a trust it is perfectly well established that where the death is recent the purchaser ought not to inquire, and does not inquire, whether there are debts or not, and if he does not inquire and has no notice that the debts are paid, he is quite safe. In the same way, where there is a charge of debts with an implied power of sale, and the purchaser* gets the legal estate, he would be protected by a Court of Equity whether there are such debts or not, unless he has knowledge that there are no such debts. . . . . The only remaining point is what period of time is sufficient to raise a presumption that the debts have been paid? . . . . I think it desirable that a rule should be laid down upon which parties may act without having to come to a Court of Equity, and in my opinion the reasonable period is twenty years. The reason why I say twenty years is this: that is the period of limitation for a specialty debt, and we know as a fact

* And even if he did not get the legal estate (*Colyer* v. *Finch*, 5 H. L. C. 905).

that most landowners owe mortgage debts. It, therefore, seems reasonable to say that after twenty years, which is sufficient to bar mortgage debts and all other specialty debts, there is a presumption that the debts are paid, especially when you find a beneficiary in the enjoyment of the estate—a circumstance mentioned by Lord St. Leonards in *Stroughill* v. *Anstey* (1 D. M. & G. 654)." The older cases of *Sabin* v. *Heape* (27 Beav. 553); *Forbes* v. *Peacock* (12 Sim. 528); *Wrigley* v. *Sykes* (21 Beav. 337); and *Greetham* v. *Colton* (34 Beav. 615), in which the periods that had elapsed were respectively 27, 25, 33, and 13 years, may now be disregarded in this respect.

Executors selling leaseholds.

The same rule has been applied to the case of executors selling leasehold estates.

In *Re Molyneux and White* (13 L. R. Ir. 382; 15 *ibid.* 383), a testator who died in 1847 possessed of leaseholds for years, by his will directed his debts to be paid, and bequeathed the residue of his property after payment of his debts to his executors in trust to pay certain annuities, some perpetual and others terminable. There was no specific bequest of the leaseholds. Thirty-seven years after the death, the executors put up the leaseholds for sale: it was not suggested that any debt of the testator remained unsatisfied. V.-C. Chatterton and the Court of Appeal held that the rule in *Tanqueray-Willaume* v. *Landau* applied, and that after the lapse of twenty years the purchaser could not safely accept the title from the executors without being satisfied that there were unpaid debts which justified the sale; (and see *Re Ryan and Cavanagh*, 17 L. R. Ir. 42). On the other hand, in *Re Whistler* (35 Ch. D. 561), Kay, J., said that he was not aware of any authority for the doctrine that after twenty years the power of an executor to sell personal estate was to be deemed at an end, and he considered that the rule established by *Tanqueray-Willaume* v. *Landau* did not apply to the case of such an executor. The case of *Molyneux and White* was not brought to his notice, and the contract in *Re Whistler* was made within the twenty years.

The rules stated in this and the preceding section are subject to the qualification common to all general rules of

construction for the ascertainment of a testator's intention, namely, "unless a contrary intention appear by the will." It is competent for a testator expressly to declare by his will that his executors are not thereby given power to sell his real estate, and he may equally declare this intention by implication: and any argument founded on the inconvenience of a direction to pay debts without any machinery to raise the money to pay them, is usually met by the answer that the testator never contemplated the probability that his real estate would be required for payment of his debts.

Devisee in trust may raise money by sale, when.

18. It is now enacted by 22 & 23 Viet. c. 35, s. 14, "Where by any will which shall come into operation after the passing of this Act (13 August, 1859), the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy, or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments, or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other; and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment as the person or persons executing the same shall think proper.

Power to extend to survivors, &c.

"S. 15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent, or devise, or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

Executors to raise money, &c., where no

"S. 16. If any testator who shall have created such a charge as is described in the 14th section, shall not have devised the

hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this Act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate. sufficient devise.

"S. 17. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by ss. 14, 15, and 16 of this Act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof. Purchasers not bound to enquire as to fulfilment of provisions of Act.

"S. 18. The provisions contained in ss. 14, 15, and 16 shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the passing of this Act; but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this Act had not passed: and the said several sections shall not extend to a devise to any person or persons in fee, or in tail, or for the testator's whole estate or interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do." Saving of previous rights, and of rights of devisees in fee or in tail.

It will be observed that s. 14 gives the power of sale to the devisees in trust, not to the executors. Apart from the Act, the executors have an equitable power of sale: and it has not been decided whether the effect of the section is to take away this power from the executors, nor whether the purchase-money on a sale by the devisees in trust ought to be paid to such devisees or to the executors whose duty it is to pay the debts. The power to give receipts contained in s. 23 throws no light on this. But the latter question would arise in any case where the executors and devisees in trust are different persons; and the question of Questions arising on sect. 14,

the continuance of the executors' power would arise in the like case where the legal estate was outstanding in some person whose concurrence in a sale could be obtained by the executors. It may also be contended that s. 14 does not extend to any devise of a mere equitable estate, but only to a legal devise.

on sect. 16, It has been held that an administrator with the will annexed cannot exercise the power given by sect. 16 (*Clay to Tetley*, 16 Ch. D. 3); but that an acting executor, where the other has renounced, can do so (*Re Fisher and Haslett*, 13 L. R. Ir. 546; and see 21 Hen. VIII., c. 4; *post*, sect. 21; and Conveyancing Act, 1882, sect. 6).

on sect. 18. The 18th section has recently received judicial interpretation. In *Re Wilson, Pennington* v. *Payne* (34 W. R. 512), Kay, J., explains it thus: "The meaning is that where a testator has devised his whole estate and interest directly to A., or to A. and B., or to any number of persons as tenants in common, or joint tenants, in fee or in tail, so that the devisees or devisee could themselves mortgage the property, then the executors are not to have the power. But where the estate is devised by way of settlement, so that there is not any individual or number of individuals who are able to make a title to a mortgagee, then that is the very case to which sect. 16 is intended to apply."

General scheme of the Act. 19. The scheme of the Act appears to be briefly as follows: Where the testator has devised the whole estate (*qu.* legal) to trustees, they are to sell. Where he has devised to uses in succession (*i.e.* not merely to devisees in fee, or in tail), then the executors are to sell. And where he has devised in fee, or in tail, then the devisees are to sell. If the legal estate were outstanding (*e.g.* in a mortgagee), and the executors desired to sell the equity of redemption only, or to join in a sale by the mortgagee, then it is submitted that the equitable power of the executors remains unaffected, and that they can sell and give a good discharge. If the legal estate is devised within the meaning of sect. 14 or the proviso in section 18, it appears to have been assumed that the executors are the proper persons to give a receipt (see *Corser* v. *Cartwright*, L. R. 7 H. L. 731, at p. 740; and *West of England Bank* v. *March*, 23 Ch. D. 138, at p. 151).

20. The Act expressly authorizes sale or mortgage: and *Re Wilson*, above cited, was the case of a mortgage. Mortgage or sale authorized.

It is submitted that, apart from the Act, where executors have a power of sale for payment of debts, and, indeed, in all cases where charges are created but no mode of raising such charges is provided, and the estate is given beneficially as real estate, the power may be exercised, or the charges raised, by mortgage instead of by sale. A mortgage is only a conditional sale (*Mills* v. *Banks*, 3 P. W. 9); and as the testator has not expressly directed, but only authorized, a sale, and has contemplated the continued existence of his estates as land, it may well be that executors who raise the charge by mortgage, instead of by sale, are giving more accurate effect to the testator's wishes, than if they sold out and out; (see *Stroughill* v. *Anstey*, 1 D. M. and G. 642). It would be otherwise, if there were an express trust for sale: such a trust would not, as a general rule, authorize a mortgage.

21. By 21 Hen. VIII., c. 4, after a preamble stating that divers persons had willed that their lands should be sold by their executors for payment of their debts, &c., but that although some of their executors accepted, others refused to intermeddle with the execution of the will or the sale of the lands; "and forasmuch as a bargain and sale of such lands, &c., after the opinion of divers persons, can in no wise be good or effectual in law, unless the same bargain and sale be made by the whole number of the executors named to and for the same"—; it is enacted "that, where part of the executors named in any such testament of any such person so making or declaring any such will of any lands, tenements, or other hereditaments to be sold by his executors after the death of any such testator do refuse to take upon him or them the administration and charge of the same testament and last will wherein they be so named to be executors; and the residue of the same executors do accept and take upon them the care and charge of the same testament and last will, then all bargains and sales of such lands, tenements, or other hereditaments so willed to be sold by the executors of any such testator, as well heretofore made as hereafter to be made by Sale by acting executors under 21 Hen. VIII., c. 4.

him or them only of the said executors as so doth accept, or that heretofore hath accepted and taken upon him or them any such care or charge of administration of any such will or testament, shall be as good and effectual in the law, as if all the residue of the same executors named in the said testament so refusing the administration of the same testament had joined with him or them in the making of the bargain and sale of such lands, tenements, or other hereditaments so willed by the executors of any such testator, which heretofore hath made or declared or that hereafter shall make or declare any such will of any such lands, tenements, or other hereditaments after his decease to be sold by his executors."

Extended application of the Act.

It is submitted that the Act extends to enable a single acting executor to sell; and, although the letter of the statute applies only to cases where executors have a power, yet, being a beneficial law, it is by construction extended to cases where lands are devised to executors to be sold (Co. Litt. 113*a*).

In *Bonifaut* v. *Greenfield* (Cro. Eliz. 80), there was a devise to four persons named and their heirs to sell and apply the money to the performance of the will, and the four were appointed executors: one renounced, and it was held that the other three could sell. But in *Denne* v. *Judge* (11 East, 288), where there was a devise to five trustees upon trust to sell and apply the purchase-money to certain uses, and a residuary gift, and the five trustees were also appointed executors, it was held that the statute had no application. Lord Ellenborough said that the estate was not devised to them as executors, but as devisees, and that they had nothing to do with the land as executors: if the fund, when raised, had been distributable by them in that character, that might have brought the case within the Act.

Copyholds within the Act.

Copyholds are within the Act: and a disclaimer relates back so as to take effect *ab initio*, and validate a sale by the acting executors made before the execution of such disclaimer (*Peppercorn* v. *Wayman*, 5 De G. & Sm. 230).

Disclaimer of power under Conv. Act, 1882.

By the Conveyancing Act, 1882, sect. 6, it is enacted that a person to whom any power, whether coupled with an interest or not, is given, may by deed disclaim the power, and after dis-

claimer shall not be capable of exercising or joining in the exercise of the power. On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power. This section applies to powers created by instruments coming into operation either before or after the commencement of the Act.

Application of Act.

It is submitted that this section applies to the power of sale given to executors by a charge of debts, notwithstanding that the marginal note refers to trustees. Such marginal notes form no part of the Act and are not binding (*Claydon* v. *Green*, L. R. 3 C. P. 511; *Att.-Gen.* v. *G. E. R. Co.*, 11 Ch. D. 449 at pp. 461, 465; and *Sutton* v. *Sutton*, 22 Ch. D. 511 explaining *Re Venour*, 2 Ch. D. 522).

It may here be added that there is in Ireland no statute corresponding to the 21 Hen. 8, c. 4; and consequently where one of two executors renounced probate, it was held by Cusack-Smith, M. R., that his acting co-executor could not afterwards exercise the power of sale which had been vested in both (*Thompson* v. *Todd*, 15 Ir. Ch. R. 337). But it has recently been held (*Re Fisher and Haslett*, 13 L. R. Ir. 546) that the defect has been remedied by the 6th sect. of the Conveyancing Act, 1882. In the case cited a testator directed that all his just debts should be paid as soon as conveniently might be after his decease, and further directed that his house property and the ground-rents payable to him should be sold by his executors, and he appointed A. and B. his executors. A. renounced probate and B. alone proved, and afterwards contracted to sell the real estate. On a V. and P. summons by the purchaser, Chatterton V. C. held that the renunciation under seal of A. operated as a disclaimer by deed of the power of sale by A. within the meaning of sect. 6 of the Conveyancing Act, 1882; and that B. could alone exercise the power.

Executors cannot purchase their testator's estate.

22. It is stated (Co. Litt. 113 a.) that, albeit one executor refuse, yet the acting executor cannot make sale to him that refused, because he is party and privy to the last will, and

remains executor still. This is not now law (*Mackintosh* v. *Barber*, 1 Bing. 50, 7 Moore 315; and see *Stacey* v. *Elph*, 1 M. & K. 195.)

But a continuing executor cannot, either immediately or by means of a trustee, be the purchaser from himself of any part of the assets, but shall be considered a trustee for the persons interested in the estate, and shall account for the utmost extent of advantage made by him of the subject so purchased (*Hall* v. *Hallet*, 1 Cox, 134). This is involved in the rule of equity that a trustee cannot buy from himself (*Fox* v. *Mackreth*, 2 B. C. C. 400). But a sale by acting executors to one of themselves or to a trustee for one of themselves was good at *law* (*Mackintosh* v. *Barber*, cited above).

23. The power of an executor is not determined by the death of his co-executor, but survives to him (*Flanders* v. *Clark*, 3 Atk. 509. See *post*, Survivorship of Powers; and Conveyancing Act, 1881, sect. 38).

Sale by surviving executors, when valid.

And Coke says (Co. Litt. 113 *a*): The executors having but a power to sell, they must all join in the sale. Then put the case that one dies: It is regularly true that, being but a bare authority, the survivors cannot sell. But, if a man deviseth his land to A. for a term of life, and that, after his decease, his land shall be sold by his executors generally, and make three or four executors, and during the life of A. one of the executors dieth, and then A. dieth, the other two or three executors may sell, because the land could not be sold before, and the plural number of his executors remain. But if they had been named by their names, as by J. S., J. N., J. D., and J. G., his executors, then in that case the survivors could not sell the same, because the words of the testator could not be satisfied. But if a man deviseth land to his executors to be sold, and the one dieth, yet the survivor may sell the land; because, as the state, so the trust shall survive.

Mr. Hargrave, in his note to the above section, contends that where a power of selling is given to executors, or to persons *nominatim* in that character, a surviving executor ought to be able to exercise the power, for, by the death of his co-executors,

the whole character of executors becomes vested in the survivor, and the power being annexed to the executors *ratione officii*, and the office itself surviving, the power annexed should also survive.

Powers of executor of executor.

24. In all cases, except of special trust and authority without the office of executorship, the executor of an executor, how far so ever in degree remote, stands as to the points both of being, having and done, in the same plight as the first, and immediate executor (2 Williams on Executors, 8th ed. 963). It is stated by Wentworth (Off. Ex. c. 20, p. 462, 14th ed.) that a special trust recommended to an executor, as to sell land, is not performable by his executor, and accordingly Lord St. Leonards (Pow. 129) says that, in the absence of clear intention, the representative of an executor cannot exercise a power vested in the executor, and for this he cites a case (19 Hen. VIII., 9): "If a man declare his will that B. and C., his executors, shall sell his land, and die, and B. dies, and C. makes D. his executor, and dies, and D. sells, this is void, for the trust is strict." It is to be observed that this is not a case of a power given to executors simply, but to persons *nominatim*, who are described as executors; and it would appear reasonable that, if a man directed that his executors should sell his land, this should mean every person who may fill that office; for the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; and so long as the chain of representation is unbroken by any intestacy, the ultimate executor is the representative of every preceding testator (1 Williams on Executors, 258, and Hargrave's note, Co. Litt. 113 a; and see *post*, Survivorship of Powers).

Where the power is implied.

And, moreover, it appears that where the executors take an *implied* power, the executor of an executor may sell, the intent being that the power shall be executed by the person into whose hands the money is to come (*Forbes* v. *Peacock*, 11 M. & W. 630, and Sug. Pow. 116, citing 1 Cha. Ca. 178; *Sabin* v. *Heape*, 27 B. 553).

The question in each case would be, whether the testator in

the particular instance intended to repose a personal confidence in the donee of the power or not. There is nothing impossible or illegal in allowing a man to repose confidence in persons whom he does not know (Sug. Pow. 129). If it were otherwise, this would be a simple solution of the difficulty that often arises in determining whether an implied power of sale is to be exercised by the executors or the heir; for *nemo est hæres viventis*, and a man cannot say with certainty who his heir may be. Hence the objection that, although a man might trust his executor whom he does know, he cannot intend to trust his executor's executor, whom he does not know, is of no weight.

Acts of executor before probate.

25. An executor derives his authority from the will, not from the probate, but the probate is the necessary evidence of his executorial character. Probate, when taken out, relates back to the date of the death. Accordingly it has been held that an act done by an executor before probate is valid, provided the will be ultimately proved, although the executor who did the act died without proving the will (*Wankford* v. *Wankford*, Salk. 299). In *Brazier* v. *Hudson* (8 Sim. 67), a term of years was vested in A.; he died, having appointed B. his executrix; she assigned the term to C., and died without proving. It was held that on letters of administration to A. with the will annexed being taken out, the assignment to C. would be established. So, too, if administration be obtained by suppressing a will which contains an appointment of executors, such administration is avoided *ab initio* by the title of the executors when probate is granted (*Abram* v. *Cunningham*, 2 Lev. 182). But it is otherwise, if the will contains no appointment of executors (*Boxall* v. *Boxall*, 27 Ch. D. 220).

Sale of real estate.

It would seem to follow from this that executors, who have a power to sell real estate, may exercise it before taking out probate, and give a valid title to a purchaser; but in order to complete that title, so as to make it marketable, it must be shown that they were the persons in whom the power was vested, and this can only be done by the production of probate.

And in *Newton* v. *Metropolitan Railway Co.* (1 Dr. & Sm. 583), where a bill was filed by executors before probate, alleging that

the will had not been proved, and praying an injunction to restrain the company from taking or continuing in possession of certain leaseholds contracted to be sold to the company by their testator, the Court held that it was perfectly competent for the plaintiffs to file their bill, alleging the truth as to the probate not having been yet granted, &c., alleging that the company had taken possession, and to apply for an injunction to restrain them from retaining possession until the purchase-money was paid, even if the grant of probate was still delayed. But it was also held that, although executors can make an assignment, and give a receipt for purchase-money, which are binding, yet a purchaser is not bound to pay the purchase-money until probate, because, till the evidence of title exists, the executors cannot give a complete indemnity.

This would appear to apply to the case of a sale of real estate by executors under an implied power, given to executors as such. In such a case it would appear that a purchaser is entitled and ought to refuse to complete until probate has been taken out.

Powers expressly given to executors who renounce.

There is a conflict of opinion as to whether a power expressly given by the will to the executors exists in, and can be exercised by executors who renounce.* Sir E. V. Williams (1 Executors, 290, 8th ed.) thinks not, unless the power is given to them in their proper names, and without reference to their office of executors; and he cites Perkins (548) :— "If a man will that A. and B. his executors, shall sell, &c.,

* By 20 & 21 Vict. c. 77, s. 79, it is enacted that where any person, after the commencement of that Act (25 August, 1857) renounces probate of the will of which he is appointed executor, or one of the executors, the rights of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. And by the 21 & 22 Vict. c. 95, s. 22, whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed in like manner as if such person had not been appointed executor. (As to retracting renunciation, see *In the goods of Gill*, L. R. 3 P. & D. 113.)

and they refuse before the Ordinary, yet it seems they may sell, because they are certainly named, so that it appears the will of the testator is that they shall sell whether they refuse or not. But otherwise it shall be (as it seems) if he will that his executors shall sell, without expressing their names, and they all refuse before the Ordinary, they cannot sell" (and see *Yates* v. *Compton*, 2 P. W. 308). Lord St. Leonards (Pow. 118) says that they can exercise it; and this seems to have been expressly decided in a case, *temp.* Hen. VII. (Sug. Pow. 893), at any rate as to equitable estates, where it is said, "And if a man has feoffees upon confidence, and makes a will that his executors shall alien his lands, there if the executors renounce administration of the goods, yet they may alien the land, for the will of land is not a testamentary matter, nor have the executors to interfere in this will, except so far as a special power is given to them." "And if a man make his will that his executors shall alien his lands without naming their proper names, if they refuse the administration or to be executors, yet they may alien the land. *Quod fuit concessum per* Fineux *et* Tremaile for clear law. Rede *non dedixit.*" It is to be observed, however, that this was before the Statute of Wills, 32 Hen. VIII., c. 1; and the will therefore acted merely as a direction to the feoffees, and had no validity at law.

Equitable estates.

Legal estate.

Administrator cannot sell.

But the administrator cannot sell if no executors be appointed or if the executors renounce. "And if a man has feoffees in his land, and makes his will that his executors shall sell his land, and then he does not make executors, then the Ordinary shall not meddle with the land, nor the administrators neither, for the Ordinary has only to meddle with testamentary matters as of goods, and consequently no more can the administrator who is but his deputy. And therefore it was lately adjudged in the Exchequer Chamber by all the Judges of England that if a man makes a will of his lands that his executors shall sell the land and alien, &c., if the executors renounce administration and to be executors, then neither the administrators nor the Ordinary can sell or alien, &c. *Quod fuit concessum per* Rede *et* Tremaile for good law." (See, too, *Re Clay and Tetley*, 16 Ch. D. 3.)

The question in all such cases really is, whether the confidence is reposed in the individuals named, or in the persons who *de facto* fill the given office. In *Att.-Gen.* v. *Fletcher* (5 L. J. Ch. 75), there was a gift to "charitable purposes according to the best judgment of M., sole executrix of the will." M. renounced; and Lord Langdale held that the power was coupled with the office and could not be exercised after renunciation; but the point does not seem to have been argued. And in *Madden* v. *Madden* (23 L. R. Ir. 167), a testatrix gave two houses, held under a lease for lives renewable for ever, to her brother M. B., in trust for the clothing and education of his children; and continued, "Should my brother wish to emigrate with his family, I leave to my executor J. L., full power to raise money on or to sell those houses to enable him to do so; but this is only if he clearly sees it more beneficial for M.'s young family; and after paying all expenses of the voyage, the surplus sum to be, by my executor, applied as he shall see best for the benefit of my nieces;" and she appointed J. L. sole executor of her will. He renounced probate; and administration was granted to M. B. The latter, having made arrangements to emigrate, sold the houses to X., with the consent of J. L., who joined in the conveyance. Many years afterwards X.'s representatives contracted to sell the houses, and the purchaser's objection that on the renunciation of J. L. the power of sale ceased to be exercisable, was overruled by the V.-C., who held that the power was given to J. L. in his individual capacity, and not *virtute officii;* (and see *Crawford* v. *Forshaw*, (1891) 2 Ch. 261).

It might perhaps be considered that in every case where a testator directs a sale of his lands by his executors, and appoints A. and B. executors, he means that A. and B. shall sell his land; but this would not apply to powers annexed by implication to the office of executor; in such a case, at any rate, it seems that executors who renounce could not exercise it. But it is not so clear as to the powers expressly given to executors: if it is to be regarded as a bare power given to several *nominatim* (a view which is perhaps supported by the necessity for passing 21 Hen. VIII. c. 4, before referred to), how could it, apart

from recent legislation, be exerciseable by the survivors or survivor? That it is so exerciseable, however, is shown by *Howell* v. *Barnes* (Cro. Car. 382) and *Brassey* v. *Chalmers* (4 D. M. & G. 528). If, on the other hand, it is annexed to the office (and this seems to have been the ground of the two last-mentioned cases), how can any persons exercise it who renounce the office? Cf. *Keates* v. *Burton*, 14 Ves. 434, and the cases of consent to marriage to be given by executors. Such consent is considered to be personal, and not annexed to the office (*Graydon* v. *Hicks*, 2 Atk. 19).

The Probate Acts do not seem to affect the question, except so far as regards powers annexed by implication to the office.

Extent of power.

26. A power may extend to enable a disposition of the fee, although no words of inheritance are used.

The powers of executors to sell their testator's real estates are necessarily co-extensive with the requirements to be fulfilled by such sales. If, therefore, a testator directs that his land be sold, and the produce distributed among certain persons, his executors will be authorized to sell the whole fee; if the power of sale arise by implication from a charge of debts on the real estate, that also will enable them to dispose of the fee, for it may be requisite in order to carry out the testator's intention of paying his debts, and the purchaser is not bound to inquire to what extent the testator is indebted (*Spalding* v. *Shalmer*, 1 Vern. 303).

But there are other cases in which the intention is not so clear. It may, perhaps, be stated as a general rule, that—

Primâ facie extends to the fee.

The donee is to be taken to have intended to create a power to pass the whole of his estate and interest, in the absence of all expression to the contrary.

In *Alloway* v. *Alloway* (4 Dr. & War. 380), Lord St. Leonards

says:—"Where the power is created in general terms, and there is nothing on the face of the instrument to control those terms, the Court ought to construe the power as enabling the donee to appoint a fee simple estate, and it ought not to require the expressions 'manner and form,' or 'shares and proportions,' for the purpose of spelling out the intention of the donor, but should adopt the plain rule that, where the general scope of the power is not inconsistent with such a construction, the donee may appoint the absolute interest, whether in cases of real or personal estate." The object and scope of the instrument creating the power, and the purpose for which it is created, must also be considered. In *Wykham* v. *Wykham* (18 Ves. 395, at p. 415), the Lord Chancellor says:—"This power is to grant, convey, limit, and appoint to trustees without saying to them and their heirs or executors; leaving the nature and quantity of the estate they were to take open to the construction of the person who was to execute the power. There was nothing which could determine what he was to do, except by reference to the instrument out of which the power arose, the estates contained in that instrument, and the purposes for which the power was given"; (and see *Tomlinson* v. *Dighton*, 1 P. W. 149). In *Bradley* v. *Cartwright* (L. R. 2 C. P. 511), the power, which was contained in a will before the Wills Act, authorized the donee to appoint to all and every the issue, child or children of his body, in such shares and proportions, manner, and form, as he should think fit. The Court (p. 522) considered that this would entitle the donee to appoint to the children in fee. In *Doe* d. *Chadwick* v. *Jackson* (1 Moo. & Rob. 553), a deed to lead the uses of a fine to effect partition between coparceners and their husbands, limited one share, after life estates to the husband and wife, "to the use of the child and children for ever, subject nevertheless to such directions, orders, and appointments" as the husband should appoint. This was held to be a power to appoint the fee.

Power in favour of particular object before Wills Act.

Since the Wills Act words of inheritance are not necessary to create by will a power to dispose of the fee; and even before that Act, a power given by will to appoint an estate to particular

objects authorized the limitation of the fee, although no words of inheritance were used. In *Saltonhall's case* (2 Lev. 104, *sub nom. Lieſe* v. *Saltingstone*, 1 Mod. 189), a man devised lands to his wife for life, and "that she might dispose thereof to anyone of her children she pleases." On a second hearing it was held by three judges against one, that this enabled a disposition of the fee. In *R.* v. *Marquis of Stafford* (7 East, 521), a testator gave a power to A. to appoint an estate "to the use and behoof of the lawful issue of the body of A., in such parts, shares, and proportions, manner, and form as A. should by deed or will direct." This was held to give a power to appoint the fee. In *Crozier* v. *Crozier* (3 Dru. & War. 353, 383), the words, "from and after the decease of A., I devise the same unto the issue male and female of A." in such shares and proportions as A. should by will appoint, were considered by Lord St. Leonards to authorize an appointment of the fee.

Powers created by will since the Act.

It has been said that a power to appoint to such persons merely as A. shall choose, enables only the appointment of life estates; but if it be to such uses, or for such estates, this will extend to an appointment of the fee. This distinction cannot exist with regard to wills coming into operation after the Wills Act; for, as a general devise without words of inheritance will now pass the fee, it may well be held to give the power over the fee to the person in whom a power of appointing the property is vested, although the power itself does not contain words of inheritance, or words equivalent to them (Sug. Pow. 400); and it is submitted that the rule above stated, and Lord St. Leonards' opinion in *Alloway* v. *Alloway*, are more in accordance with principle even in cases of wills before the Act and of deeds. In *Kenworthy* v. *Bate* (6 Ves. 793), estates were limited by settlement to the use of B. P. for life, remainder to the use of P. for life, remainder to the use of such child or children of the marriage as B. P. should appoint. It was not doubted that this admitted of an appointment of the whole fee. In *Strutt* v. *Braithwaite* (5 De G. & Sm. 369), hereditaments were vested in trustees by a marriage settlement on trust for husband and wife successively for life, and after certain trusts (which did not take effect) for the children as the husband and

wife should appoint, on trust in default of appointment, "to convey all the same premises unto and amongst such children equally." The Vice-Chancellor held the children took estates in fee. The conveyance to the trustees was in fee, and in a marriage settlement for the benefit of children, a direction to convey to them must mean to convey to them in fee; (and see Sug. Pow. 398).

Powers created by reference.

27. Powers created by reference to other powers, will be taken to be of the same extent and nature as such other powers, having regard to any change of donee, object, or circumstance. If there be any contingency or restriction personal to the donee of the power to which reference is made, such contingency or restriction will not be attached to the created power (*Harrington* v. *Harrington*, L. R. 3 H. L. 295): and if the original power is inconsistent with limitations and conditions to be attached to the new power, the latter will be made to conform to the intention displayed by such limitations. Thus, in *Crossman* v. *Bevan* (27 B. 502), a testator directed that if his daughter A. should marry, she and her husband should have a similar control over the portion he provided for her in that event as his daughter B. had by her marriage articles; but if A. should marry and die without issue, the fund was, after the death of herself and her husband, to revert to the testator's surviving children, or, in case of their death, to their nearest relatives. B.'s articles, after the usual powers of appointment among children, and gift to them in default of appointment, gave her a general power of appointment in case there should be no children. This general power was held to be negatived in A.'s case by the ultimate limitation; (and see *post*, Powers of Charging, and *Earle* v. *Barker*, 11 H. L. C. 280).

The implication of an intention to create or keep in existence a power by reference may be rebutted by other evidence of intention.

In *Lord Shrewsbury* v. *Keightley* (19 C. B. N. S. 606, affirmed L. R. 2 C. P. 130), a private Act of Parliament by which estates were settled on the issue of the settlor as they should succeed to the earldom, contained powers for each tenant for life or in tail

to lease all or any part of the lands for three lives, or for twenty-one years, or for a term of years determinable on three lives, so as there should be reserved and made payable by every such lease the usual and accustomed yearly rents, boons, and services, with a proviso of re-entry for non-payment. By a subsequent Act, part of these estates were conveyed to trustees, freed, &c. of all uses, powers, &c., in trust to sell and convey to purchasers: but it was provided that until such sale the estates should be held, possessed, and enjoyed, and the rents, issues, and profits thereof had, received, and taken by, and be applied to, and for the benefit of, such person and persons as would have been entitled thereto if the Act had not been passed. This proviso was held not to extend so as to keep alive the original power of leasing: the Court thought that it would be defeating the object of the settlement to allow a tenant for life to lease for 99 years, determinable on lives, at a nominal rent, and taking a fine; for the best and most improved rent was not required to be reserved.

Persons to execute powers given by reference.

In *Taylor* v. *Miles* (28 B. 411), lands were limited in settlement by an instrument which gave no estate to the trustees, but gave them powers of sale, leasing, and cutting timber. The tenant for life devised lands of his own to other trustees in fee to the same uses and subject to the like powers as the settled estates stood limited. It was held that the trustees of the settlement were the persons to execute the powers of sale, leasing, and cutting timber over the devised estates.

A general reference to the trusts and powers of an existing will or settlement incorporates the trusts and powers referred to, but not the point of time when the benefits are to arise. Thus, in *Hare* v. *Hare* (24 W. R. 575), property was settled by a marriage settlement on the husband and wife successively for life, with remainder to their children and issue as they should appoint, with remainder to their children equally. Subsequently the husband's mother settled a fund on herself for life, and after her death on such of the trusts, &c. of the marriage settlement for the benefit of the children as should be then subsisting. Jessel, M. R., held the children took immediately on the death of their

grandmother, and were not to wait until their interests came into possession under the settlement on the death of their own parents.

"Such or the like" trusts and powers mean corresponding, not necessarily identical, trusts and powers (*Re Smith, Bashford* v. *Chaplin*, 45 L. T. 246; and see *Garde* v. *Garde*, 3 Dr. & War. 435; *Marshall* v. *Baker*, 31 Beav. 608).

And a covenant to surrender copyholds to the same uses as freeholds (without mentioning powers) makes the copyholds subject in equity to the same powers as the freeholds (*Minton* v. *Kirwood*, 3 Ch. App. 614).

In *Berchtoldt* v. *Hertford* (7 Beav. 172), £10,000 was settled by deed on A. for life, with power to appoint to her children or issue, and in default in trust for the children; A. had power to appoint a life interest to her husband. Subsequently the settlor by will gave money "to be laid out for the sole benefit of B., in the same manner as nearly as may be as the £10,000 I have secured for A." It was held that B. had the same powers to appoint to children, issue, and husband that A. had.

In *Morgan* v. *Rutson* (16 Sim. 234), lands were limited by deed to such uses as A. should appoint, and in default to A. for life, with remainder to his son for life, with remainder to his first and other sons in tail male; and these limitations were followed by powers of sale and leasing, exercisable with the consent of A. and his son during their lives. A., desiring to relinquish his life estate, appointed to his son for life, with remainder to the uses upon the trusts, and subject to the powers in the original deed, *ulterior* to the limitations therein, for the lives of A. and his son. It was held that this included the powers of sale and leasing, although in strictness they would operate in derogation of, and were not ulterior to, the life estates.

General powers not to be restricted in executed instrument.

28. A power expressly created in general terms by an executed instrument is not to be cut down, except by express words.

Therefore if there is, first, a general power of appointment

given, and then a limited power in default of appointment under the general power, the general power is not to be cut down, although the deed creating the power be a marriage settlement, and its natural object (of providing for the wife and children) will be defeated (*Minton* v. *Kirwood*, 3 Ch. 614; and cf. *Lord Cardigan* v. *Armitage*, 2 B. & C. 197; *Harrison* v. *Symons*, 14 W. R. 959; *Jones* v. *Davies*, 8 Ch. D. 205).

In *Peover* v. *Hassel* (1 J. & H. 341), the settlement in question (which contained no special recitals) conveyed real estate of the wife to her for life (not for her separate use), remainder to trustees to preserve, remainder (in case of forfeiture) to the trustees in trust for the wife for her separate use, remainder to the husband for life, and after the decease of the survivor, "if there should be any children or issue living of the said then intended coverture, to the use of such person and persons for such estate and estates, interest and interests, and to and for such ends, intents, and purposes, and upon such trusts, and charged and chargeable in such manner, and subject to such powers of revocation, &c., as the husband shall by deed or will appoint;" and in default of appointment, to the use of the children of the marriage in tail, and in default of such issue, according to the general appointment (in the same terms as above) of the wife, and in default of such appointment to the heirs of the wife. The Vice-Chancellor, after reviewing all the authorities, decided that the settlement must be upheld; he distinguished *Bristow* v. *Warde*, on the ground of the articles there being executory, and on the use of the words "in such manner" there; and he relied on the large terms of the power in the settlement before him, saying that if he cut down the power in that case, he must hold that there was no case in which such a power could be inserted in a marriage settlement.

In *Wood* v. *Wood* (10 Eq. 220), funds and leaseholds were vested by ante-nuptial settlement in trustees on trust for such person as M. S., a *feme sole*, should generally appoint, and in default of appointment, for M. S. for life for her separate use; and after her decease, for any future husband her surviving, for life; and after his decease, in trust for all the children of any

marriage of M. S., as she by deed or will should appoint, and in default of such appointment, for her children, as therein mentioned. M. S. married in 1867, and by deed-poll, in 1869, purported to exercise her general power by appointing to her husband and herself as joint tenants. The Master of the Rolls held that there had been a valid exercise of the general power; (and see *Meade-King* v. *Warren*, 32 Beav. 111; and *contrà*, *Gould* v. *Gould*, 2 Jur. N. S. 484).

Power of charging.

So, too, a power in a marriage settlement of charging certain sums in certain events must take effect when those events happen, and cannot be limited, controlled, or questioned in any degree, on the ground that under different states of circumstances different results would be arrived at (*Knapp* v. *Knapp*, 12 Eq. 238).

Executory instruments.

But if the instrument be executory, the Court, applying its rules with reference to such instruments, may interfere to give effect to the intention of the instrument.

In *Bristow* v. *Warde* (2 Ves. Jun. 336), money was limited by marriage articles to the husband during the joint lives of himself and his wife; and if he should die first, leaving issue, to her for life; and after her decease, *in such manner as the husband should appoint; and in default of appointment, to the issue equally at* 21, *with an allowance for maintenance and education.* The greater part of the fund was laid out in the purchase of land, which was settled under the direction of the Court in manner purporting to be in execution of the articles: this settlement gave the husband a special, not a general, power of appointment. The husband appointed under the power given by the articles, so as to make it necessary to decide whether that power was general or special. Lord Rosslyn said, "It is clear upon the articles he had no more power under them than what he took to himself under the settlement executed with regard to

the bulk of the money. The articles were made to secure a provision for the intended wife and the issue of the marriage; the power of appointment is not indefinite, but is confined to the issue"; (and see *Mildmay's Case*, 1 Co. Rep. 175; *Cooke* v. *Briscoe*, 1 Dr. & Walsh 596; *Swift* v. *Swift*, 8 Sim. 168, and Sug. Pow. 439).

In *Tasker* v. *Small* (6 Sim. 625; 3 M. & C. 63), marriage articles recited an agreement by A. the husband to settle lands to certain uses, subject to raising £15,000 for A.'s benefit by *mortgage or otherwise;* and A. covenanted that he would settle the lands accordingly, subject to raising the said sum *by mortgage, annuity, or otherwise, and to any deed for securing the repayment thereof and interest;* this was held to authorize a sale. The Vice-Chancellor said it would be too much to say that the power was to be cut down, because there was a foolish reference to the deeds by which the raising of the £15,000 was to be effected.

It may be observed that the ordinary covenant to surrender copyholds in a settlement to the uses declared of the freeholds is not executory in the same sense as marriage articles and other agreements resting *in fieri* (*Minton* v. *Kirwood*, 3 Ch. 614).

Powers created by will.

Powers created by will depend on the intention of the testator, to be collected from the will; but the principle, that general powers expressly given are not to be cut down, unless the intention is perfectly clear, applies *à fortiori*, for there is no inference in favour of children in wills.

In *Re Jeffery's Trusts* (14 Eq. 136), a testator gave his residuary estate to A. for life, and after her death among her children, grandchildren, or other issue, as she should appoint, and in default of such appointment as she should generally appoint, and in default of such appointment, over. A., after reciting that she had no children, purported to exercise the general power. She afterwards had children, but died without revoking the appointment. V.-C. Malins considered that the general power could not be, and was not intended to be, exercised except in the event of there being no issue of A: and the decision may probably be supported on the latter ground, though

not on the construction of the power itself; (see *Richardson* v. *Harrison*, 16 Q. B. D. 85).

In *Mackinley* v. *Sison* (8 Sim. 561), a testator gave his daughter a life interest in funds, with remainder to such persons as she should by deed or will appoint, and in default of appointment, to her children, and in default of children, over. This general power was held valid, and not to be restricted by the subsequent gift to children in default of its exercise.

Limited powers will not control general gift, *semble*.

It has been held, too, that the fact that a person has a limited power of appointment will not control the generality of words of limitation under which he takes an absolute estate in default of the exercise of such power. In *Barrymore* v. *Ellis* (8 Sim. 1), an annuity was assigned to trustees on trust to pay the same to such persons as A., a married woman, should, notwithstanding coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation; and for want of such appointment, on trust to pay the same to A. for her separate use. It was held that A. had both a restricted power of appointment and the general uncontrolled dominion over the property; and *Medley* v *Horton* (14 Sim. 222), is to the same effect. But in *Brown* v. *Bamford* (11 Sim. 127; 1 Ph. 620), stock was bequeathed to trustees in trust, during the life of a married woman, to pay the dividends when and as they became due, but not by way of anticipation, to her appointees; and in default of appointment, *into her proper hands*, for her separate use, and her receipts were to be sufficient discharges. In this case the Lord Chancellor reversed the Vice-Chancellor's decision, and held that the restraint on anticipation extended to the whole gift. But he stated, apparently with approval, the principle of *Barrymore* v. *Ellis* to be that where a limited power of appointment is created, and in default of the execution of such power, the estate is given generally to the same person, it is competent to the donee to dispose of the estate without regard to the power, the execution of which he is at liberty to waive or abandon; (see, however, 3 Davidson, 3rd ed., 84, n. *et seq.*; *Harnett* v. *Macdougall*, 8 B. 187; *Moore* v. *Moore*, 1 Coll. 54).

The intention in each case should prevail: in *Barrymore* v. *Ellis*, and *Medley* v. *Horton*, this would seem to have been disregarded: for the restraint on anticipation is nugatory, unless it apply to the whole gift.

Powers additional or substitutional.

29. If a power of sale, jointure, or the like already exists, and a second similar power is conferred on the same donee, it is in each case a question of intention whether the second power is intended to be additional or substitutional.

If the power is burdensome.

If both powers are given to the same person for the same object, and are a double burden upon the property subjected to them, the presumption will be in favour of substitution.

In *Wigsell* v. *Smith* (1 S. & S. 321; 5 Russ. 299), a settlement after limiting two estates to A. for life, with remainder to his sons in tail, with remainder to M. for life, with remainders over, required each person when in possession to assume the name and arms of the settlor, gave the tenants for life powers of leasing and charging the estates with a jointure of £400 per annum and a sum of £2,000 for younger children, and reserved to the settlor a power of revocation and new appointment as to one estate. This power was exercised by revoking, as to one estate, the remainder to M. for life and the limitations over; and by appointing that estate to S. for life, with remainders over; and by giving to A. and S., when entitled as tenants for life in possession, "under the limitations aforesaid," powers of charging the estate with a jointure of £400 per annum, and with £3,000 for younger children, subject to a direction that there should never be more than the yearly sum of £400 per annum payable out of any part of the premises as a jointure at one time, and by directing the assumption of the appointor's name and arms as in the former deed.

It is to be observed that A. never could be in possession "under the limitations aforesaid," *i.e.*, of the second appointment, for he was in by the first appointment; and even if it were not so, the insertion of the power was, as regards A., a mere repetition of that in the former settlement, and the whole scope of the deed showed the intention that it should be substitutional, and

the two clauses which were repeated, as well as the charging clauses, were the name and arms' clause and the leasing powers, neither of which could be cumulative. On the whole scope of the instrument it was clear that the intention was not to give an additional power.

If power is administrative.

But the presumption will not arise, if the powers do not constitute a burden; and in favour of the general intention of a deed, the evidence afforded by a recital may be disregarded.

In *Boyd* v. *Petrie* (7 Ch. 385), a mortgage containing the usual power of sale was transferred by a deed which recited the mortgage, and that "the power of sale had not been and was not intended to be exercised;" the assignment was of the moneys and "all powers and remedies for recovering the same respectively," and all benefit of the said several indentures of mortgage, and of every covenant and security therein respectively contained. The mortgaged estates were also conveyed, and the deed contained a distinct and independent power of sale. The Lords Justices held that this second power was additional.

Inference against referential reduplication.

And, *à fortiori*, if the power is created by way of reference to another power, the inference will be against reduplication of charges (*Hindle* v. *Taylor*, 5 D. M. & G. 577)—"It is not a reasonable way of reading a trust, created by reference to other trusts, to consider everything as there repeated, and so to make it a duplication as it were of trusts in the nature of charges" (*Cooper* v. *Macdonald*, 16 Eq. 258).

In *Eustace* v. *Robinson* (7 L. R. Ir. 83), on the marriage of M. a sum of £10,000 was settled upon trust to advance the husband £4,000 and subject thereto upon the usual trusts for the sponses and their children. The wife's father by his will directed that a legacy of £4,000 should be settled on the same trusts as the £10,000 comprised in the settlement. The Irish Court of Appeal, affirming V.-C. Chatterton, held that the effect was not to increase the sum to be advanced to the husband, but to make the aggregate trust fund £14,000, of which £4,000 was to be advanced to the husband.

30. The object of the power may be of any nature, not infringing any rule of Law or Equity.

Object of power.

It may be to revoke, either wholly or in part, the limitations made by the settlement; whether the power extends to the whole or only to a part will depend on the intention appearing on the particular settlement (*Freke* v. *Lord Barrington*, 3 Bro. C. C. 274); or to raise concurrent interests for different purposes. The ordinary powers in a settlement to jointure a wife, and to create a term for securing a portion for younger children are instances of this.

Must not be illegal.

But it must not be illegal. If, therefore, the power transgress the laws against perpetuity, it will be void.

In *Duke of Marlborough* v. *Lord Godolphin* (1 Eden, 404), a testator devised his real estates to several persons for life, with remainders to their first and other sons in tail male successively, and he empowered and directed his trustees, on the birth of every son of each tenant for life, to revoke the uses thereinbefore limited to their respective sons in tail male, and to limit the premises to such sons for their lives, with immediate remainders to the respective sons of such sons in tail male. This power was held void as tending to a perpetuity.

In *Ferrand* v. *Wilson* (4 Ha. 344) there was a devise to the executors for 21 years, and subject thereto to two successive tenants for life, with the usual limitations to preserve contingent remainders and successive remainders in tail to the children of the second tenant for life, with remainders over. The trusts of the term were to fell timber and apply the proceeds and the rents of the real estates until all the testator's debts and pecuniary legacies were paid. The will contained a power to the executors as well during as after the term, until a tenant in tail or in fee attained 21, to fell timber and invest the proceeds (subject to the trusts of the term) in the purchase of other estates to be settled to the same uses. V.-C. Wigram decided that whether the trust was imperative or permissive, and whether the timber

was to be regarded as part of the annual rents and profits of the estate or not, the power was void, inasmuch as its object was to receive and invest the annual rents and profits (if they were to be regarded as such) until a tenant in tail should attain 21; an event which might not occur for ages, perhaps never; or (if the timber was to be regarded as part of the inheritance) yet the distinction between it and the rest of the inheritance was to be borne in mind, for timber is always alienable during the infancy of a tenant in tail, although the corpus of the estate is not.

It is, however, difficult to reconcile this decision with the remarks of L. J. Knight-Bruce in *Briggs* v. *Earl of Oxford* (1 D. M. & G. 363): in that case estates were vested in trustees on trust to raise money to discharge incumbrances, and subject thereto, to two persons successively for life, with remainder to the sons of the second tenant for life in tail male, with remainders over in fee. The power was for the trustees to cut timber so long as any mortgage debt remained, and to apply the proceeds in discharge of incumbrances. L. J. Knight-Bruce said:—"The circumstance of the power being liable to destruction by the tenant in tail is of itself sufficient to preclude all objection, at least to a power of this description, on the ground of perpetuity." It is true that there was also the fact that the power amounted to a contract that the enjoyment of the estate should be limited to a certain extent until the payment off of certain charges, and that the person in possession had only to pay off the charges, and there was an end of the power. But the Lord Justice's words are express as to the sufficiency of the existence of an estate tail, to prevent the flaw of perpetuity. In this respect the case is identical with *Ferrand* v. *Wilson*. Moreover (notwithstanding any doubts that Lord Eldon's remarks in *Ware* v. *Polhill* (11 Ves. 257) may have suggested), it is well settled that an unlimited collateral power of sale in a settlement by which estates tail are created, is good; for any of the tenants in tail can, by a disentailing assurance, destroy the power so created (*Biddle* v. *Perkins*, 4 Sim. 135; *Waring* v. *Coventry*, 1 M. & K. 249, 252, *n.*; *Hale* v. *Pew*, 25 Beav. 335; Lewis on Perpetuity, 541).

Unlimited power of sale.

The same reasoning applies to all other powers of a like

nature, including that in *Ferrand* v. *Wilson;* it would appear, therefore, that the conclusion ought to be the same in all cases.

It may here be added that a trust for accumulation to pay debts is good (*Southampton* v. *Marquis of Hertford*, 2 V. & B. 54, 65; *Marshall* v. *Holloway*, 2 Sw. 432; *Bateman* v. *Hotchkin*, 10 B. 426.) Such trusts were excepted from the Thellusson Act (s. 2); *Barrington* v. *Liddell* (2 D. M. & G. 502). But in order to support the trust, the Court must be satisfied that the testator's *bonâ fide* intention was to make proper provision for payment of his debts (*Varlo* v. *Faden*, 27 B. 255; 1 D. F. & J. 211; *Mathews* v. *Keble*, 3 Ch. 691). And if the debts have been paid off by a sale of part of the estates, the Court will not create a new scheme for the benefit of the remaindermen by continuing the accumulation to replace the estate sold (*Tewart* v. *Lawson*, 18 Eq. 490; *Re Green, Baldock* v. *Green*, 40 Ch. D. 610.) And this would apparently enable a tenant for life to sell under the Settled Land Act, and apply the proceeds of sale in discharging mortgages, and so entitle himself to immediate possession (*Norton* v. *Johnstone*, 30 Ch. D. 649; and see Settled Land Act, s. 58, sub-s. 1 (vi); and *Re Jones*, 26 Ch. D. 736; *Re Clitheroe*, 31 Ch. D. 135; 50 & 51 Vict. c. 30; *Re Egmont*, 45 Ch. D. 395).

The object of the settlement is the true limit.

And these powers are moreover valid, whether the remainder to which they are collateral is in fee or in tail. The true limit is pointed out by the intent of the settlement: when the purposes of the settlement are spent, the power is no longer capable of being exercised; and this is so, of whatever nature the power may be, whether of sale, exchange, partition, enfranchisement, leasing, or otherwise.

As soon as the fee vests in possession, whether it be by estates tail being barred or otherwise, the powers are determined.

In *Lantsbery* v. *Collier* (2 K. & J. 709), V.-C. Wood says:— "Whether the remainder in fee of the estate to which the power is collateral is limited so as to depend upon estates tail (in which case the power is upheld, as in *Waring* v. *Coventry*, upon the ground that it can be defeated by any tenant in tail), or whether that remainder in fee or reversion in fee is limited in some other manner, and so as not to depend by way of remainder

on an estate tail (*Boyce* v. *Hanning*, 2 C. & J. 334), in which case, whenever that estate in fee vests in possession, the whole object and purpose of the settlement is at an end, and the power ceases, in either case, the power, although not in terms restrained to lives in being and twenty-one years afterwards, is a valid power, and is not affected by the rule against perpetuities" (*Cole* v. *Sewell*, 4 Dru. & War. 1, 32; *Wallis* v. *Freestone*, 10 Sim. 225; *Nelson* v. *Callow*, 15 Sim. 353; *Turvin* v. *Newcome*, 3 K. & J. 16; Sug. Pow. 848). And it has been said that the existence of objections on the ground of perpetuity to a power of sale, will not prevent the valid exercise of the power during the continuance of limitations which are within the prescribed limits (*Wood* v. *White*, 4 M. & Cr. 460).

It is the custom of conveyancers expressly to restrict the exercise of powers of sale within the limits of the rule against perpetuities, although powers of leasing are not in general expressly so confined (3 Davidson, 482, n.).

Power annexed to a term of years.

But if the power is annexed to a long term of years, which overrides everything and cannot be barred, the power will be bad. Where estates were assured to the use of trustees for 500 years, and subject thereto to the use of A. for life, with remainder to his first and other sons in tail, with remainder to B. for life, with remainder to his first and other sons in tail, with divers remainders over, a power to the trustees to enter and manage the estates during the minority of any person who should from time to time be entitled under the limitations of the settlement to the immediate freehold as tenant for life or in tail, was held void for remoteness (*Floyer* v. *Bankes*, 8 Eq. 115).

Power to arise on general failure of issue in a deed.

And a power to charge, which is only to arise after a general failure of issue, who do not inherit under the limitations of the instrument creating the power, is bad for remoteness.

In *Bristow* v. *Boothby* (2 S. & S. 465), a marriage settlement, after successive life estates to husband and wife, limited the estates to the sons in tail male, with remainder to the daughters in tail general, with remainder to the survivor of husband and wife in fee; and gave power to the wife, if the husband sur-

vived her, and all the children of the marriage died without issue, to charge the estate. There was no limitation to the daughters of sons; a son might have died under 21, leaving a daughter, in which case the power could not have been barred, nor would it be exerciseable until a general failure of issue; it was therefore bad. The authority of this case has been doubted (*Eno* v. *Eno*, 6 Ha. at p. 179). It is to be observed, however, that the instrument on which the question arose was a deed; but *quære* whether the issue, in default of whom the power was to arise, should not by reference have been construed to mean such issue as was before specified. As to this, cf. *Baker* v. *Tucker* (3 H. L. C. 106); *Parker* v. *Tootal* (11 H. L. C. 143); *Davies* v. *Mereeron* (4 Ch. D. 182).

In a will before the Wills Act.

Before the Wills Act (sect. 29), the term "die without issue," or the like, pointed to an indefinite failure of issue. Consequently, in wills coming into operation before the Act, a power to arise on the indefinite failure of issue would be bad for remoteness, unless it were subsequent to and barrable with an estate tail.

In *Case* v. *Drosier* (5 M. & C. 246), a testator created a term of 500 years, and subject thereto devised estate A. to Thomas for life, with remainder to his sons in tail male, with remainder to his daughters in tail general, with remainder to Philip, with similar limitations in remainder; and he devised another estate in the same way, only putting Philip before Thomas. The trusts of the 500 years' term were that, in case either Thomas or Philip should die without issue, whereby the survivor would become entitled to all his estates comprised in the said term, the trustees should have power to raise £2,000 for each of his granddaughters. This trust or power being annexed to a term antecedent to the estate tail, and being therefore not barrable, was held bad. This case was followed in *Sykes* v. *Sykes* (13 Eq. 56).

By sect. 29 of the Wills Act, the term "die without issue," or the like, is restricted *primâ facie* to a failure of issue at the death.

Where some of the objects are not within the due limits.

But a power is not bad for remoteness because some of the objects thereof are not within the limits allowed by law; for

those may be selected to whom a valid appointment in this respect may be made (*Attenborough* v. *Attenborough*, 1 K. & J. 296; *Hockley* v. *Mawbey*, 1 Ves. jun. 150; *Slark* v. *Dakyns*, 10 Ch. 35; *Griffith* v. *Pownall*, 13 Sim. 393). It would be otherwise, in cases of appointments made before Lord Selborne's Act (37 & 38 Vict. c. 37), if the power did not authorize an exclusive appointment; in such a case the appointment must necessarily include objects without the limits, and the whole power would consequently be bad. And it has been said that, unless the words of the power are express and clear, the Court will prefer the construction that will uphold the power. In *Re Veale* (4 Ch. D. 61), the power was to appoint "to and amongst my other children or their issue." Jessel, M. R., said, "On the actual words of the will you have no right to limit the power; but you have a right to limit it to a class to whom a valid appointment can be made under the law against perpetuity."

Limitations in default of appointment under a power which is void for remoteness are not invalid, unless they themselves contravene the rule against perpetuities (*Re Abbott*, 1893, 1 Ch. 54).

Limitations in default of exercise of void power.

CHAPTER IV.

OF THE PERSONS BY WHOM POWERS MAY BE EXECUTED.

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1. Every person who is capable of disposing of an estate actually vested in himself, may exercise a power over land (Sug. Pow. 153); in like manner, every such person may exercise powers affecting personalty. The execution of the power in the latter case operates as a direction to the trustees in whom the personalty is vested, to hold it for the appointee's benefit; the execution of a common law power or a power under the Statute of Uses operates so as to vest the land subject to it, without more, in the appointee. It has been held by V.-C. Hall that, before the Act abolishing forfeiture for treason and felony, an undischarged felon, at large under a ticket of leave, who had before conviction executed a settlement with a power of revocation, could execute the latter power so as to create a valid mortgage (*Mainprice* v. *Pearson*, 25 W. R. 768).

Married women.

2. In addition to the persons above mentioned, a *feme covert* can, apart from any statutory provisions, execute a power, whether it be simply collateral, or relating to the land (*Lady Travel's case*, cited 3 Atk. 711; *Peacock* v. *Monk*, 2 Ves. sen. 191); and her husband's concurrence is not necessary (*D.* d.

Acknowledgment by her, and her hus-

Blomfield v. *Eyre*, 5 C. B. 713). This being the state of the law before 3 & 4 Wm. IV. c. 74, it is clear that her execution need not be acknowledged by her under that statute: it is expressly provided (sect. 78) that the powers of disposition given by that Act shall not interfere with any powers she had before the Act. husband's concurrence, unnecessary.

In *Wright* v. *Lord Cadogan* (2 Eden, 239), the Lord Chancellor said (p. 252): "It has throughout the case been admitted that a woman may now, antecedent to her marriage, retain a power over a legal estate of which she is seised, so as to have during coverture a power to dispose of it (which is done by complying with the requisites) in the same manner as she might have done if she had not put herself under coverture;" (and see *Field* v. *Moore*, 7 D. M. & G. at p. 703; Co. Litt. 112 a, n. 6).

A married woman may also exercise a power over personalty, whether it be in possession or reversion; and if it be the latter, her execution need not be acknowledged under Malins' Act, 20 & 21 Vict. c. 57. Over personalty.

Before 3 & 4 Will. IV. c. 74, a married woman could not release or extinguish a power affecting land, except by fine or recovery (Sug. Pow. 92). But by that Act (sect. 77), it is enacted that, after the 31st December, 1833, a married woman may release or extinguish any power which may be vested in or limited or reserved to her, in regard to any lands of any tenure or any money subject to be invested in the purchase of lands, by deed acknowledged in manner provided by the Act, with her husband's concurrence. And under the Conveyancing Acts it is submitted that she can now do so without acknowledging the deed (see *ante*, p. 18). Release of powers over land.

By 20 & 21 Vict. c. 57, it is enacted that after the 31st December, 1857, it shall be lawful for every married woman to dispose by deed of every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate to which she shall be entitled under any instrument made after the said 31st December, 1857 (except her marriage settlement), and also to release or extinguish any power which may be vested in or limited or Over personalty.

reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a *feme sole*, and also to release and extinguish her equity to a settlement out of any personal estate to which she or her husband in her right may be entitled under any such instrument as aforesaid. But every such deed must be acknowledged in the same manner as deeds under 3 & 4 Will. IV. c. 74, and the husband must concur; and the section does not apply to cases where the married woman is restrained from anticipation. So far as the release or extinguishment of powers is concerned, it is submitted that this section is superseded by the provisions of the Conveyancing Acts (see *ante*, p. 18).

May execute power during second coverture.

3. It makes no difference that the power is given to the wife, when she is married to A., and that she survives A. and marries B.; she may exercise it during her second coverture, or during her widowhood: in like manner she may exercise it, although it be given to her when she is unmarried, and she afterwards marries.

In *Burnet* v. *Mann* (1 Ves. sen. 156), the power was to the husband and wife and the survivor of them: the wife survived and married again: an appointment by her, during her second coverture, was upheld.

Unless restrained in terms.

4. But the appointor may be expressly restrained by the terms of the instrument creating the power—*e. g.*, a power to be executed by A. "while sole," cannot be exercised by A. while covert.

In *Horseman* v. *Abbey* (1 J. & W. 381), the trustees of a marriage settlement were directed to raise £1,000 on the death of the survivor of husband and wife, in case there should be no issue of the marriage living at her death; and to pay the same "as the wife at any time or times during her coverture, and notwithstanding the same," by any deed should appoint. This power was held to be exerciseable during that particular coverture only; (and see *Morris* v. *Howes*, 4 Ha. 599; *Burnham* v. *Bennett*, 2 Coll. 260; *Holliday* v. *Overton*, 14 B. 467; *Antrim* v. *Buckingham*, 1 Eq. Ca. Abr. 343).

And a power which has no existence, except in the event of

the death of the wife while covert, cannot be exercised by her at all if she survive her husband (*Noble* v. *Willock*, 8 Ch. 778; L. R. 7 H. L. 580; *post*, p. 156).

Or by implication.

It has been held that a general power reserved to a single woman in a settlement made by herself was not exerciseable during coverture by implication from the limitations in default of appointment (*Gould* v. *Gould*, 2 Jur. N. S. 484); but the case is of doubtful authority; Lord St. Leonards disapproves of it (Pow. 155); and in *Wood* v. *Wood* (10 Eq. 220), the Master of the Rolls declined to follow it. In the last-mentioned case a *feme sole* settled her property some months previously to her marriage by deed to which her future husband was not a party, on trust for such persons as she should by deed or will appoint, and in default of appointment for herself for life for her separate use; and after her death without having exercised such power of appointment, for any future husband her surviving for life; and after his decease, for the children of the marriage as she should appoint, and in default of appointment for the children: the settlement contained a provision that her after-acquired property should be subject to the same trusts. It was contended that this last provision was inconsistent with the contention that the power was exerciseable during coverture; but the Master of the Rolls thought that it might be exercised at any time.

A power to be exercised "notwithstanding coverture" may be exercised at any time (*D.* v. *Bird*, 5 B. & Ad. 695).

Forum to decide whether married woman's will exercised a power or not.

5. The Court of Chancery was the proper forum for deciding whether a married woman's will was an execution of a power, and therefore operative, or not. The principle upon which the Court of Probate acted in granting probate to wills of married women is stated in *Paglar* v. *Tongue* (L. R. 1 P. & D. 158). When the Court was satisfied that a *bonâ fide* question as to the existence of a power, enabling a married woman to make a will, was intended to or might be raised, it granted a limited probate of such will, to enable the question as to the existence of the power to be determined by the Court of Chancery (see *Noble* v. *Phelps*, L. R. 2 P. & D. 276, and *Tatnall* v. *Hankey*, 2 Moo.

P. C. 342). And in like manner the Court of Chancery had no jurisdiction to entertain a suit on the ground of fraud, when the effect would be to revoke the probate (*Allen* v. *Macpherson*, 1 H. L. C. 191; *Melnish* v. *Milton*, 3 Ch. D. 27).

Since the Judicature Acts, all the judges of the High Court have the same jurisdiction; and any judge may, if he chooses, when an action has been brought in the wrong division, retain the action and exercise the jurisdiction. But it would not be considered a sound exercise of such discretion for a judge of the Chancery Division to grant probate (*Pinney* v. *Hunt*, 6 Ch. D. 98), or to recall probate (*Bradford* v. *Young*, 26 Ch. D. 656).

If a case arises as to the execution of a power, and the Probate Division has all the parties before it, there is no reason why that division should not determine the question of the validity of such execution. But if, as is usually the case, all necessary parties are not before the Court, the usual and proper course is still to grant limited probate and leave the question of validity of execution to be determined by the Chancery Division (*Re Tharp*, 3 P. D. 76; and see *Harding* v. *Sutton*, 59 L. T. 838; *Phillips* v. *Jenkins*, 44 L. T. 281). The Judicature Acts have made no difference in the practice as to non-contentious business in the Probate Division (*Re Tomlinson*, 6 P. D. 209).

Extent of *jus disponendi*.

6. It may here be added that a *feme covert*, when not restrained from alienation, has, apart from the Married Women's Property Act, in equity the same *jus disponendi* over her separate estate, both real and personal, by deed or by will as she would have if free from the disability of coverture; and not the less so because a specific power of appointment, in a particular way, over the property, is given her by the instrument settling the property to her separate use (*Taylor* v. *Meads*, 13 W. R. 394; 34 L. J. (Ch.) 203; 4 D. J. & S. 597). In that case Lord Westbury says: "With respect to separate property, the *feme covert* is, by the form of trust, released and freed from the fetters and disabilities of coverture, and invested with the rights and powers of a person who is *sui juris*. To every estate and interest held by a person who is *sui juris*, the common law attaches a right of alienation; and accordingly the right of a *feme covert* to dispose of her separate estate was recognized and

admitted from the beginning, until Lord Thurlow devised the clause against anticipation. But it would be contrary to the whole principle of the doctrine of separate use to require consent or concurrence of the husband in the act or instrument by which the wife's separate estate is dealt with or disposed of; that would be to make her subject to his control and interference. The whole lies between a married woman and her trustees, and the true theory of her alienation is, that any instrument, be it deed or writing, when signed by her, operates as a direction to the trustees to convey or hold the estate according to the new trust which is created by such direction. This is sufficient to convey the *feme covert's* equitable interest; and when the trust thus created is clothed by the trustees with the legal estate, the alienation is complete both at law and in equity;" (and see *London Chartered Bank, &c.* v. *Lemprière*, L. R. 4 P. C. 572; *Noble* v. *Willock*, 8 Ch. 778; L. R. 7 H. L. 580; *Re Drummond and Davie*, (1891) 1 Ch. 524). If the estate were not settled to the separate use of the wife, equity followed the law, and gave her no power of disposition over it by will, and only such a power by act *inter vivos* as she would have had if her estate were legal. And as to the Married Women's Property Act, 1870, see *Re Voss* (13 Ch. D. 504); *Johnson* v. *Johnson* (35 Ch. D. 345).

Corpus of real estate may be held to separate use.

7. The corpus of real estate may therefore be settled to the separate use of a married woman, if the intention be clear. In *Taylor* v. *Meads* (4 D. J. & S. 597), land was conveyed to trustees in fee (in default of a power of appointment, which was not executed) upon trust for E. M., her heirs and assigns; and the testator declared that E. M.'s estate should be for her separate use. This gave her a separate estate in the corpus. But there must, of course, be a clear intention to annex the separate use to the whole fee, and not merely to the life estate. In *Troutbeck* v. *Boughey* (2 Eq. 534), a testator gave all his real and personal estate to trustees, in trust for his wife for life, and after her decease for his daughter absolutely; and he directed that the principal moneys, rents, issues, profits, interest, dividends, and proceeds, which his wife and daughter, or either of them, should be entitled to under his will, should be paid

Unless a contrary intention appears.

into their own proper hands, as the same became due, and not by way of anticipation; and should be for the separate use and benefit of his wife and daughter; and for which moneys, rents, issues, profits, interest, dividends, or proceeds, the receipt alone of his wife and daughter, whether covert or sole, should be an effectual discharge to his trustees. V.-C. Kindersley considered that the terms of the will could only refer to the income and corpus of the personalty and the income of the realty. "How can the fee simple of real estate be paid into her own proper hands?" he asked; he also laid stress on the term "become due," and on the receipt-clause, as being inapplicable to real estate in fee; (cf. *Re Bown*, 27 Ch. D. 411).

Separate use will arise as required.

8. Although it was formerly doubted, it is now well settled, that property given to a woman for her separate use may be held as such during coverture, although the property originally, or at any subsequent period or periods of time, became vested in her when discovert. Whilst the disability of coverture does not exist, the separate use does not arise; when it does exist, the separate use at once arises (*Re Gaffee*, 1 Mac. & G. 541; *Tullett* v. *Armstrong*, 1 B. 1). And a restraint upon anticipation attaches to the separate estate only, and therefore has no effect except during coverture (*ibid.*). But the quality of separate estate may be destroyed during discoverture, as in *Wright* v. *Wright* (2 J. & H. 647), where stock in the funds was bequeathed to a woman for her separate use without power of anticipation. There was no trustee, and the legatee, while discovert and *sui juris*, sold out the stock, spent part of the proceeds, and invested the rest in bank shares, and afterwards married. It was held that the separate use had been destroyed.

And the quality of separate estate ceases at the wife's death; and the husband is then entitled *jure mariti*, without taking out administration to her personal property in possession and undisposed of by her (*Molony* v. *Kennedy*, 10 Sim. 254; *Tugman* v. *Hopkins*, 4 Man. & Gr. 389); and also to her chattels real settled to her separate use and undisposed of by her (*Archer* v. *Lavender*, 9 I. R. Eq. 220). And the Married Women's Property Act, 1882, has made no difference in this respect (*Re Lambert*,

39 Ch. D. 626; and see *Smart* v. *Tranter*, 43 Ch. D. 587; *Surman* v. *Wharton*, (1891) 1 Q. B. 491; *Hope* v. *Hope*, (1892) 2 Ch. 336).

The husband may entitle himself to her undisposed-of choses in action as her administrator. If the husband and wife have been judicially separated, and the wife dies intestate during such separation, her property goes as if her husband were then dead (20 & 21 Vict. c. 85, s. 25). The powers of disposition by married women have been greatly enlarged by the Married Women's Property Act, 1882. The short effect of that Act, so far as material to be here stated, is, that all property coming to a woman married after 31st December, 1882, belongs to her for her separate use; and all property coming to a woman married before that day, and her title to which has not accrued in any way before that day, belongs to her for her separate use (see *Reid* v. *Reid*, 31 Ch. D. 402).

Infants.

9. An infant cannot, at common law, alien his estate, except by force of a custom; but he may, at common law, do any act, wherein he is a mere instrument or conduit-pipe, just as a *feme covert* may. Upon the same principle it would seem to follow that an infant may execute a power simply collateral, deriving its effect from the Statute of Uses (Sug. Pow. 177). In *Hearle* v. *Greenbank* (3 Atk. 710), Lord Hardwicke says: "There are several kinds of powers infants may execute; as where an infant is a mere instrument or conduit-pipe, and his interest not concerned. Lord Coke (Co. Litt. p. 52a, s. 66) says: 'Delivering seisin is a mere ministerial act, and requires no judgment or discretion;' but though the latter words are expressed generally, the law anciently was not so; and in Co. Litt. (128 a), Lord Coke himself cites a passage, out of the Mirror, in which it is expressly said an infant cannot be an attorney. As in the sense of an attorney in a court of justice he cannot be; but when we speak of an infant's being an attorney, it is a good deal different from these kinds of powers. Before the Statute of Uses, the power was over the use; therefore all things necessary to be done over legal estates were done by way of conditions; and this was the method of exercising an authority over the legal estates; and at law an infant might perform a condition

where it was for his benefit. As to other kinds of powers by an infant, I find no sort of authority."

How far infant may exercise power coupled with interest.

10. According to Mr. Preston (1 Abstracts, 326), "An infant may execute a power coupled with an interest, if his infancy be dispensed with; or if, from the nature of the power, it be evident that it was in the contemplation of the author of the power that it should be exercised during the minority." This statement is quoted without disapproval by Lord St. Leonards (8th ed. p. 911), and by Lord Hatherley (*King* v. *Bellord*, 1 H. & M. 343); and was acted upon in *Re Cardross' Settlement* (7 Ch. D. 728). In that case funds belonging to an infant were, on her marriage, vested in trustees, upon trust to retain existing investments, or to convert and reinvest with the consent of husband and wife during their joint lives. The question was whether the wife was competent, while still an infant, to give her consent to a reinvestment. Jessel, M. R., expressly adopted the above-cited passage from Preston, and held that, as it must have been contemplated that the joint assent might have to be exercised during the wife's minority, she was competent to consent.

In *Re D'Angibau* (15 Ch. D. 228), by a settlement made on the marriage of an infant, it was agreed that her share in certain personal estate, in which, under her father's will, she would on marriage acquire a vested interest, should, as soon as the case would admit, be assigned to trustees, in trust for investment with the consent of husband and wife, and to pay the income to the wife for life, and, after the death of the survivor of husband and wife, and in default of children (which event happened), in trust for such persons as the wife should by deed or will appoint, and, in default of appointment, in trust, if the wife predeceased, for her next of kin. The wife, while still a minor, by deed appointed the fund to her husband, subject to her own life interest, and subsequently died under age. Jessel, M. R., held that the wife's exercise of the power was valid; and his decision was confirmed by James and Brett, L. JJ., *dissentiente* Cotton, L. J.

Principle of referring

This case certainly goes further than any other case in the

books, and rests on the principle that the exercise of the power is to be referred to the creator of it, which is thus expressed by Bridgeman, C. J. (*Grange* v. *Tiving*, Bridg. 107; Sug. Pow. 910): "In the case of a bare power or authority, where an infant or *feme covert* is used but as an instrument or conduit-pipe by another who has no such disability, though upon the act an alteration or transference of an estate do follow, yet the law looks upon him from whom that power or authority is derived, not upon the weakness of the person acting by it." It may be doubted whether this does not prove too much; for, if it were universally true, property settled by A. to such uses or on such trusts as B. (an infant) should appoint, and in default of appointment for B. absolutely, could be dealt with by B. by an exercise of the power.

exercise of power to the creator of power.

11. It is submitted that the power of an infant is at any rate subject to this qualification—that it cannot be exercised so as to divest himself of any estate or interest, although it may be that he can divest other people. Accordingly, in *Re Armit* (5 I. R. Eq. 352), it was held by the Master of the Rolls that an infant cannot exercise a power over personal property, though authorized to do so by the instrument creating the power, when such exercise goes to defeat his or her own interest therein; (and see *Shipway* v. *Ball*, 16 Ch. D. 376). And an infant cannot execute a power in gross (*Hearle* v. *Greenbank*, 3 Atk. 695, overruling *Hollingshead* v. *Hollingshead*, cited 2 P. W. 229; Sug. Pow. 911); or a power appendant over real estate, because "an infant cannot do any act affecting his property through the medium of a power, any more than he can do so directly" (*per* Jessel, M. R., 15 Ch. D. 235).

Limitation of extent of infant's powers.

Cannot exercise power in gross;

or appendant over real estate.

Lord St. Leonards states (p. 178) that an infant "might exercise a power over personalty at the age at which by law he might dispose of personalty to which he was absolutely entitled." But, since the Wills Act (sect. 7), this is of little practical importance; (and see 15 Ch. D. at p. 233).

Effect of Wills Act, sect. 7.

12. The most curious instance of an infant's power is that of presenting to an advowson. This he can do, "although he be a sucking child in the lap of his mother" (3 Atk. 702), because

Power of presenting to advowson.

the Ordinary will take care that the person presented is a fit and proper person. The guardian cannot present, because no profit can be made out of the presentation; and the guardian has nothing to do with property for which no account is to be rendered (Co. Litt. 89 a; 3 Inst. 156; and see *Arthington* v. *Coverly*, 2 Eq. Ca. Abr. 518 pl. 3).

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CHAPTER V.

EXECUTION OF POWERS.

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1. The author of a power may surround its execution with as many solemnities, and direct it to be carried out by such instruments, at such times, with the consent of or by such persons as he pleases, provided that he does not transgress the rules of law or equity. Owing to the excessive caution with which the creators of powers fenced the execution of them, it has frequently happened that their own intention, as well as that of the persons executing such powers, has been frustrated. It is a rule both of law and equity that—

Requisites for the valid execution of a power.

> Every circumstance required by the instrument creating the power to accompany the execution of it, must be strictly observed.

This rule is modified to a great extent by the aid afforded in Equity to defective executions in certain cases (see *post*, "Defective Execution").

And it may in some cases be presumed that the deed of appointment is duly executed, although the deed containing the terms of the power is lost (*Hougham* v. *Sandys*, 2 Sim. 95).

Statutory interference.

The necessity for a strict attention to the mere formalities accompanying the execution of instruments executing powers has been much modified by the interposition of the legislature: as regards wills executed subsequently to January 1st, 1838, by the Wills Act, and as regards deeds dated since August 13th, 1859, by 22 & 23 Vict. c. 35.

In order that a power might be validly exercised by deed dated, or will coming into operation, before these statutes respectively, every circumstance required to be observed, however trivial, must have been strictly adhered to.

In *Hawkins* v. *Kemp* (3 East, 410), the terms of the power

required that a revocation should be by a deed or instrument in writing, executed in the presence of and attested by three credible witnesses, and enrolled in one of her Majesty's Courts of Record at Westminster, and with the consent of H.'s wife, father, father-in-law, the trustees of a term of 500 years created by the settlement containing the power, as well as by all the trustees to support contingent remainders.

L. C. J. Ellenborough said: "Every one of these required circumstances is in itself perfectly arbitrary, and (except only as it is in fact required) unessential in point of effect to the legal validity of any instrument, by which the old uses should be revoked, or new uses declared. It is in itself immaterial whether the instrument in writing, purporting so to revoke and declare the uses, should be by deed; whether such deed should be executed in the presence of what and how many witnesses; whether it should be afterwards attested by the witnesses, and ultimately enrolled in any court of record; and whether it should be sanctioned by the consent and approbation of the several trustees named for that purpose. It might (if it had so pleased the parties creating the power) have been done by any writing of the persons so authorized, unsealed, unattested, unenrolled, and unsanctioned by any consent or approbation whatever. If these circumstances are unessential and unimportant, except as they are required by the creators of the power, they can only be satisfied by a strictly literal and precise performance. They are incapable of admitting of any substitution; because these requisitions have no spirit in them, which can be otherwise satisfied; incapable of receiving any equivalent, because they are in themselves of no value."

"Whatever arbitrary terms the grantor of the power may impose upon the party executing it, or however absurd and unreasonable they may seem to be, they must be fulfilled; as if it were required that the instrument executing the power should be witnessed by persons of a particular stature, or written on paper of a particular colour" (10 Cl. & Fin. 425).

2. Although the statutes hereafter set out have rendered this strict observance of mere formalities unnecessary in wills and

(to some extent) in deeds executing powers since their respective dates, those statutes are not retrospective. And while they would cure such defects as the lack of three witnesses, they would not affect the want of due consent or the like. It is a rule that—

Essential requisites must be observed.

No essential requisite to the execution of a power can be dispensed with.

There is nothing in the statute, nor is there any jurisdiction in Equity, to dispense with requirements of this nature, so as to make good an execution which defeats what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention.

In *Cooper* v. *Martin* (3 Ch. 47), a power was given by a testator to A., to be exercised by her before her youngest son attained 25; the residuary estate of the testator was to be distributed at the same period. It was therefore to be presumed that it was the testator's intention that the children should then know what were their vested and transmissible rights. This power was held to be improperly exercised by a will made before, but not coming into operation until after the period at which the youngest son attained 25; (*Reid* v. *Shergold*, 10 Ves. 370; *Horlock* v. *Smith*, 17 B. 572, 575).

So, a power to trustees to lend the trust fund to the husband, with the consent in writing of the wife, cannot be properly exercised without her consent previously given (*Cocker* v. *Quayle*, 1 R. & M. 535); her subsequent assent is not sufficient (*Bateman* v. *Davis*, 3 Madd. 98; *Wiles* v. *Gresham*, 2 Drew. 258, 267; *Fry* v. *Porter*, 1 Ch. Ca. 138, 143; *Greenham* v. *Gibbeson*, 10 Bing. 363). On the other hand, in *Re T.* (15 Ch. D. 78), V.-C. Malins, on a petition for advice by trustees, held that the consent of a married woman who was of unsound mind could be dispensed with; (and see *Re Neave*, 28 W.R. 976, where the donee of the power to consent was an infant; and *Re Cardross*, 7 Ch. D. 728).

Statutes. Wills Act.

3. By 7 Will. IV. & 1 Vict. c. 26, s. 10, it is enacted that no appointment made by will in exercise of any power shall be valid, unless the same be executed in manner thereinbefore

required (*i. e.*, as a will, in writing signed and acknowledged by the testator in the presence of two witnesses), and every will executed in manner thereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power shall be executed with some additional or other form of execution or solemnity.

Although the words "shall have been required" appear to point to powers created before the Act, it has been decided that the section applies to powers created since, as well as to those created before the Act (*Hubbard* v. *Lees*, L. R. 1 Ex. 255).

Lord Kingsdown's Act, sect. 1.

By 24 & 25 Vict. c. 114, it was enacted as follows: Sect. 1. Every will and other testamentary instrument, made out of the United Kingdom by a British subject (whatever may be the domicil of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made, or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicil of origin.

Sect. 2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicil of such person at the time of making the same, or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

Sect. 3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered by reason of any subsequent change of domicil of the person making the same.

Sect. 4. Nothing in this Act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this Act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this Act.

The operation of the Act is limited to wills made by persons dying after the passing of the Act (sect. 5).

In *D'Huart* v. *Harkness* (34 B. 324), personal property was held on trust for such purposes as A. should by will or codicil appoint. A. married a domiciled Frenchman and died, having made a holograph but unattested will. This will was valid according to French law, and was admitted to probate here. Lord Romilly held that the probate was conclusive that the instrument proved was the will of the testatrix, and that a power to appoint by will meant any will entitled to probate here.

In *Re Kirwan*, however (25 Ch. D. 373), Kay, J., held that a holograph codicil, admitted to probate here, was invalid as an exercise of the power under sect. 10 of the Wills Act. *D'Huart* v. *Harkness* does not appear to have been cited (and *cf. Dolphin* v. *Robins*, 7 H. L. C. 390).

In *Re Daly* (25 B. 456; 27 L. J. Ch. 751), it was held that the wife of a domiciled Englishman could not by residing in France create a French domicil for herself, so as to entitle her holograph will to be regarded as a will here.

Will made according to power entitled to probate.

It may be here observed that a will, made in execution and in accordance with the terms of a power, is entitled to probate, although it is not properly executed according to the laws of the country of domicil of the person making it (*Tatnall* v. *Hankey*, 2 Moo. P. C. 342; *In b. Alexander*, 29 L. J. Prob. 93; but see the criticisms on those cases, *In b. Hallyburton*, L. R. 1 P. & D. 90). The law takes a liberal view, and where the instrument creating the power directs it to be executed by will in a particular form, a will may be good for the purposes of the appointment, if executed according to the law of this country, though not according to the law of the domicil. That is, where the

instrument creating the power directs it to be executed by will in a particular way, it may be a good will if executed in the form required, though not according to the law of the domicil (34 B. 328).

Probate necessary.

A testamentary appointment made in execution of a power over personal estate is not available, until it has been duly proved as a will (*Ross* v. *Ewer*, 3 Atk. 160; 1 Wms. Executors, 56 *et seq.*, 8th ed.; Sug. Pow. 466). In *Re Vallance* (24 Ch. D. 177), the Court refused to act on the New Zealand probate of the will of a donee of a limited testamentary power, but required the will to be proved in this country before it would order payment out of Court of the money appointed; (see now 55 Vict. c. 5).

Effect of probate.

The effect of the grant of probate was to conclude anyone from objecting in the Court of Chancery that the instrument proved was not the will of the testator (*D'Huart* v. *Harkness*, 34 B. 324; *Douglas* v. *Cooper*, 3 M. & K. 378; and see *Bradford* v. *Young*, 26 Ch. D. 656).

Lord St. Leonards' Act.

13th Aug. 1859.

By 22 & 23 Vict. c. 35, s. 12, it was enacted that a deed thereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed, or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such a power should be executed or attested with some additional or other form of execution or attestation or solemnity: Provided always, that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed, in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing therein contained shall prevent the donee of a power from executing it conformably to the power by writing, or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

It will be observed that there is an important difference between this enactment and the Wills Act: by the Wills Act, no will is a good execution of a power to appoint by will, unless it is executed in conformity with the requirements of the statute; but a deed may be a valid execution of a power, if it be executed and attested by two or more witnesses as an ordinary deed, or according to the terms of the power.

Form of attestation clause.

4. It has frequently been a question for the Courts to decide whether a power, which is to be executed, for example, by signing, sealing, and delivery, such execution to be attested by witnesses, is validly executed, if the attestation clause does not express that all those formalities of signing, sealing, and delivery have been observed, although the instrument itself by which the power purports to be executed, expresses such observance. The cases appear to establish the following rule, subject to the statute mentioned in the last section:—

(*a.*) If a power requires two or more formalities to be attested, and the attestation clause expressly certifies that one of such formalities has been performed, then the power is not well executed.

(*b.*) But if the attestation, although a limited and special one, is of such a nature that it must be necessarily inferred that the other requisites were complied with:

(*c.*) Or if the attestation is general, then the execution is valid, unless the contrary is shown.

The principle is thus stated in *Vincent* v. *B. of Sodor and Man* (4 De G. & Sm. 294): "If the attestation expresses in any form of words an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it would be sufficient. But when the framer of the power requires two or more such acts to be done, then, if the attestation only expresses the doing of one of them, it would not be sufficient, for, in this latter case, it is clear that the framer of the power

really intends something more than the act expressed in the attestation, because he expressly added the other act (p. 307).

If there is a general attestation clause, the exact narration may be dispensed with, to the extent at least of holding that a jury might presume that the witnesses saw those acts done, which the donee of the power, in the instrument executing the power, expressed an intention to do, although there should be no evidence that the witnesses were cognizant of the contents of the instrument containing the power.

In *Newton* v. *Ricketts* (9 H. L. C. 262; 1 J. & H. 70), this is more strongly put by Lord Chelmsford, who says that the law must be taken to be, that if *de facto* the power was properly executed, and the witnesses saw that it was so executed, and they had simply signed their names as witnesses, no memorandum of attestation was necessary.

(*a.*) In *Wright* v. *Wakeford* (17 Ves. 454; 4 Taunt. 213), the power was to be executed by deed "signed, sealed, and delivered;" the attestation clause certified that the deed had been "sealed and delivered," but said nothing of signing: the Court held that, as the attestation clause did not express that the witnesses testified an execution in full conformity with the terms of the power, or, in other words, as the attestation clause was not co-extensive with the power, the execution was void.

This decision caused the passing of 54 Geo. III. c. 168, by which it was enacted that the omission of the word "signed" in the attestation clause of all deeds made *previously* to the Act, should not render such deeds of no effect; but the Act had no prospective operation.

(*b.*) In *Vincent* v. *B. of Sodor and Man* (4 De G. & Sm. 294; 8 C. B. 905; 5 Ex. 683), a power of appointment by will, to be signed and *published* in the presence of and attested by witnesses, was held well executed by a will, the attestation clause of which testified that it was signed and *sealed* in the presence of the witnesses: the ground of the decision was, that a will cannot be made without being published; (and see *Ross* v. *Ewer*, 3 Atk. 161).

In *Smith* v. *Adkins* (14 Eq. 402), a power to appoint by any

deed or instrument in writing, to be "signed, sealed, and delivered," in the presence of two or more credible witnesses, was held to be well exercised by an appointment by will, not expressed to be "delivered," but stated in the attestation clause to have been "signed, sealed, published, acknowledged, and declared to be her last will," in the presence of the attesting witnesses. The Master of the Rolls said that the publication of a will is equivalent to the delivery of it: no attestation clause was expressed to be required in this case; (and see 2 Coll. 111, n.; *Mackinley* v. *Sison*, 8 Sim. 561; *Bartholomew* v. *Harris*, 15 Sim. 78; *Re Wrey*, 17 Sim. 201).

(*c.*) In *Burdett* v. *Spilsbury* (10 Cl. & Fin. 340), a power of appointment by will, "to be signed, sealed, and published," in the presence of and attested by witnesses, was held well executed by a will (before the Wills Act), the attestation clause of which was merely, "Witness, A. B., C. D., and E. F."

Meaning of attest.

The term "attest" means that a witness shall be present to testify that the appointor has done the act required by the power. In *Freshfield* v. *Reed* (9 M. & W. 404), A.'s consent, "duly attested," was required to the execution of a power: a deed expressed to be made with A.'s consent, "testified by his being a party thereto," was held invalid: the power required A.'s written consent, signed in the presence of a witness (and cf. *In b. Eynon*, L. R. 3 P. & D. 92).

In *Warren* v. *Postlethwaite* (2 Coll. 108), a married woman had power to appoint by will, "to be by her signed and published in the presence of" two or more credible witnesses. She made a holograph will purporting to execute the power, signed her name and affixed her seal. Then followed the signatures of three of her servants, and underneath these signatures the following memorandum in the handwriting of the testatrix: "Signed and sealed at Hambrook House, this 23rd day of July, 1834, in the presence of the above witnesses, all servants in the house." It was held that, as no attestation clause was required by the power, the omission of any statement as to publication in the memorandum (considered as an attestation clause) was

immaterial. And Knight-Bruce, V.-C., further laid down that, where an attestation clause is not required, the mere fact of there being an attestation clause specifying certain formalities does not exclude evidence that other things were done besides those expressed to be attested.

Period for perfecting the execution of powers.

5. As to the period for perfecting the execution of a power, it may be laid down as a general rule that—

> The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power (*Hawkins* v. *Kemp*, 3 East, 410; Sug. Pow. 240, 255).

The consent, which is a material and important element in the execution, is usually required to be precedent to, or at least simultaneous with, the execution: if so, this requirement must be complied with (*Greenham* v. *Gibbeson*, 10 Bing. 363). But if the terms of the power admit, there seems no real reason, in considering the execution of a power of appointment to be executed by A., subject to B.'s consent, for limiting the time during which B. may consent, to the duration of A.'s life. A.'s appointment may be said to be conditional on B.'s consent: the two are independent powers; and, in the absence of all expression of intention, the consent of B. may as well supplement and render valid the appointment of A., as B.'s consent receive meaning and validity from the appointment of A. (see *Offen* v. *Harman*, 1 D. F. & J. 253; 29 L. J. Ch. 307). In that case a power of releasing certain estates from charges and substituting others in their stead, was to be executed by A. with B.'s consent, "such consent to be signified by some deed to be duly executed by him, and not otherwise." A. executed the power, but B.'s formal consent by deed was not given till nine months after. It was shown, however, that he had consented by parol previous to A.'s execution: the power was held well executed.

The question of the time for perfecting the accompanying formalities is of less importance since 22 & 23 Vict. c. 35. But

one of the points decided in *Hawkins* v. *Kemp* (3 East, 410), was, that where the creator of the power required the deed executing the power to be enrolled, the enrolment must of necessity be made during the lifetime of the donee of the power, on the ground that the enrolment could not be made without the donee's authority, and that authority of course terminated with his life.

Attestation of witnesses, when to be made.

In *Wright* v. *Wakeford* (4 Taunt. 213), the Court of Common Pleas decided, by three against one, that the attestation of the requisite witnesses could not be supplied after the death of the donee of the power, although it was admitted that they might have added it during his lifetime. Lord Mansfield differed from the other judges, and considered that the death of the party, whose act the witnesses were to attest, did not furnish any objection to their signing the attestation after his death, because, when he had once signed, or executed, in the presence of witnesses, the instrument to be attested, he had done all that was to be done by him, and as far as respected him it was completed, and he could not rescind or annul it, although it would not be effectual unless the person to whom it was delivered should procure the witnesses to attest it; (but see *Doe* v. *Peach*, 2 M. & S. 576).

The decisions of the majority of the judges in *Wright* v. *Wakeford*, and in *Doe* v. *Peach*, are based on the ground that the intention was that the execution, and all its accompanying formalities, should be one complete act, perfected at one time; although it seems to have been admitted that the attestation might have been supplied during the lifetime of the donee of the power, perhaps on the ground that he might then be taken to renew his execution. But it is now provided (22 & 23 Vict. c. 35, s. 12) that powers, so far as regards their execution, shall be well executed, if executed in the presence of and attested by two or more witnesses, in the manner in which deeds are ordinarily executed. The intention of the Act is to assimilate the execution of deeds executing powers to that of other deeds. It would appear, therefore, that since that Act (13th August, 1859), so long as the witnesses live and remember the transac-

tion, they may properly sign their attestation of it; for the object of requiring witnesses to attest the execution of a deed is, that they may see that it is fairly and properly executed: as this is the case with regard to ordinary deeds, it must be the same with regard to deeds executing powers.

Objection that the attestation must be simultaneous with the execution, in order to raise uses.

Lord Eldon put his objection to the validity of the execution of the power in *Wright* v. *Wakeford* on another ground, namely, that the execution of the power was a limitation of an use, and that such an use could not arise except under the circumstances and at the time specified; (and see *Newman* v. *Warner*, 1 Sim. N. S. 457). The Common Law Judges did not notice this objection. If the intention of the donor of the power was, that the execution and its accompanying formalities should be one complete simultaneous act (as the judges decided), this objection seems to be a fatal one to all executions operating under the Statute of Uses. But the argument above suggested, that the legislature has now assimilated the execution of deeds executing powers with that of other deeds, would apply to this also: for an use can be raised by deed unattested by writing (see *Warren* v. *Postlethwaite*, 2 Coll. 114; and Stephen's Comment. i. 503; Shep. Touchstone, 508).

6. The next rule is the converse of the last preceding.

Where consent is requisite.

> If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others, dies, the power is gone.

In *Sympson* v. *Hornby* (Ch. Pre. 452; 2 Vern. 723, *sub nom.* *Hutton* v. *Simpson*), A. empowered his wife to dispose of his personal estate with the consent of his trustees. The wife purported to dispose of it by will without such consent. It was held inoperative.

In *Atwaters* v. *Birt* (Cro. Eliz. 856), there was a feoffment to uses, with a proviso that, on payment of 12*d.*, and procuring the assent of the feoffees, the uses should cease. It was held that this gave them an authority, and that, if one of them died, the authority determined.

In *Danne* v. *Annas* (Dyer, 219 a.), A. devised that, if his

daughter should die without issue, then, after the death of his wife, his land should be sold by his executors with the assent of B.; and he appointed his wife and another executors. After the death of the wife and of B. a sale by the surviving executor was held bad.

In *Franklin's case* (Moore, pl. 172, cited 2 Eden, 333), a testator devised that I. I. and I. K. should sell his lands by the advice of the parson of D.: before the sale the parson died. Held, the trustees could not sell; (and see *Mansell* v. *Mansell*, Sug. Pow. 252).

So, a power of revocation to be exercised by A. and B. cannot be exercised by the survivor of them (*Montefiore* v. *Browne*, 7 H. L. C. 241).

Protector of settlement.

But in *Belt* v. *Holtby* (15 Eq. 178), where two persons were appointed protectors of a settlement under 3 & 4 Will. IV. c. 74, s. 32, and one of them died, no provision being made for filling up a vacancy in the office, it was held that the surviving protector, with the tenant in tail, could effectually bar the entail.

In *Green* v. *Green* (2 J. & L. 529), a testator gave his son, if he should marry with the consent of A., power to jointure his wife and to charge a gross sum for children. A. died and the son afterwards married. Lord St. Leonards held that the power of jointuring and charging was exerciseable by the son, saying that, as he thought the intention of the parties was that the obligation to obtain the consent was imposed only during the lifetime of the party competent to give such consent, he should struggle with the technical terms so as to effectuate the intent of the parties.

7. The case of a legacy vesting at 21 or marriage with the consent of named persons, as in *Dawson* v. *Oliver-Massey* (2 Ch. D. 753); *Re Brown* (18 Ch. D. 61), is analogous. A marriage in the lifetime of the donor of the power, with his consent or subsequent approbation, is equivalent to a marriage after his death with the consent of his trustees (*Wheeler* v. *Warner*, 1 S. & St. 304, 310). The consent must, however, be absolute and unconditional (*Yonge* v. *Furse*, 5 W. R. 394).

In *Clarke* v. *Berkeley* (2 Vern. 720), a father devised lands to trustees upon trust to permit his daughter to receive the rents and profits until her death or marriage, and in case she married with the consent of two of the trustees and her mother, then to convey the lands to her and her heirs; but if she married without such consent, then otherwise. The daughter subsequently married during her father's lifetime with his consent; and it was held that the condition as to consent was dispensed with by the testator's own consent; "which was more to be regarded than any consent of trustees, to whom he had delegated a power to consent in case of a marriage after his decease"; (and see *Crommelin* v. *Crommelin*, 3 Ves. 227; *Parnell* v. *Lyon*, 1 V. & B. 479).

In *Wheeler* v. *Warner* (1 S. & St. 304), a father bequeathed stock to trustees in trust to pay the income to his daughter so long as she remained single; and if she should marry with the consent of the trustees to pay not more than one-third part of the stock to the husband; but if she should marry without such consent, then the whole capital was to be held upon certain trusts for herself and children. The daughter subsequently married during her father's lifetime without his consent, although he was afterwards reconciled to the marriage. Upon the father's death it was held that the husband was entitled to be paid one-third of the stock.

In *Tweedale* v. *Tweedale* (7 Ch. D. 633), a father by his will gave his trustees power, if any of his daughters should marry with the approbation of the trustees, to grant to the husband of such daughter for his life the income of the whole or any part of such daughter's fortune. A daughter having subsequently married during her father's life with his consent, it was held that his consent was equivalent to that of the trustees, and that after the death of the daughter her husband was entitled for his life to the income of a third part of his wife's share.

Period during which powers may be executed.

8. Ordinary powers may be exercised at any time during the lifetime of the donee: but there is a distinction between the execution of future powers, namely, between powers presently created, but exerciseable on a contingency—powers which do

not arise until the happening of a future event—and powers to be exercised by a contingent person. The question whether any particular power is a future one or not, must depend upon the terms thereof. In *Leigh* v. *Lord Balcarres* (6 C. B. 847), a testator devised his real estates to trustees in fee, on trust (so far as is material here) to pay the rents to C. during her life, but impeachable for waste for cutting timber in the lifetime of C., or for digging coal or cannel coal to be opened otherwise than under the power therein contained, with remainder to D. for life, subject to the like restrictions, with other remainders over. The will contained a power "for the person or persons (except C.) who, by virtue of the limitations thereinbefore expressed, should for the time being be seised of or entitled to the actual freehold of the hereditaments," to grant leases in possession. It was held that this was a power exerciseable by the trustees, who had the legal estate, during C.'s lifetime.

In *Malmesbury* v. *Malmesbury* (31 B. 407), family estates were settled on A. for life, with remainder to B. for life, with remainder to B.'s first and other sons in tail male, with divers remainders over, and an ultimate limitation to the use of B. in fee. The settlement contained a power for the trustees at the request of A., "and after his decease then at the request and by the direction of the person who for the time being shall under or by virtue of the limitations hereinbefore contained *be seised of the freehold and inheritance* of the said manors," to sell. It was held that after the death of A. no sale could be made by the trustees, inasmuch as there was no one who fulfilled the condition of being *seised of the freehold and inheritance*.

In *Robertson* v. *Walker* (23 W. R. 224), a testator gave all his real estate to trustees for a term of 1,000 years upon trust to secure an annuity to his wife for life, and subject thereto upon trust for A. for life without impeachment of waste, with remainder to his first and other sons in tail male, with remainders over: and he empowered his trustees "during the life of any person hereby made tenant for life who shall under or by virtue of this my will be for the time being entitled to the possession or the receipt of the rents and profits of my said estates, with

his or her consent in writing" to sell. By a codicil the testator directed his trustees to stand possessed of the term, and of the moneys to arise from the exercise of the power of sale, upon trust to pay all the rents and income to his wife during her life or widowhood in lieu of the annuity. It was held by the Lord Chancellor and Lords Justices that the power was not destroyed by the codicil, and might be immediately exercised with the consent of the tenant for life and the widow.

Execution of an existing power on a contingency.

9. A power presently given to a designated person, to be exercised upon a contingency, can be well executed before the contingency happens.

In *Wandesforde* v. *Carrick* (5 Ir. R. Eq. 486), it was held, that where a power is given to a designated person to be executed upon a contingency, it may be executed before the happening of the contingency, and the execution will be valid on the subsequent happening of the event. *A fortiori*, where the happening of the contingency cannot be ascertained until the donee's death; and an incorrect recital in the instrument executing the power, that the contingency had already happened, was held not enough to invalidate the execution. "It has been decided many times that a power, to operate upon a contingent event, like that of death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect: otherwise you might never exercise it at all" (*per* Lord St. Leonards, 4 H. L. C. 283).

In *Logan* v. *Bell* (1 C. B. 872), real estate of the wife was limited to her in fee until her marriage, and from and after the solemnization thereof, to the use of such persons as she should appoint. Her appointment by codicil before the Wills Act, between the date of the settlement and the marriage, was upheld.

In *C. of Sutherland* v. *Northmore* (1 Dick. 56), a power was given to a married woman, to be exercised in case of the death of her husband in her lifetime, and if there should be a failure of issue of the marriage at her death. She exercised the power

in her husband's lifetime and survived him. This was held a valid execution.

In *Anon.* (2 Leon. 220), a testator directed that, if he should have no issue by his wife, then after the death of his wife his lands should be sold, and the proceeds distributed "to three of his blood"; and he appointed his wife and two others executors. All of them proved the will, and after the death of the other two the wife sold. It was held that the sale, being intended to be made by the executors, was good by the survivor, and that it could be made in the lifetime of the wife, because, as she was the only surviving executor, it could not otherwise be made at all.

In *Holt* v. *Burley* (2 Vern. 651), a power to revoke a settlement was given to the wife, if she survived her husband, they not having issue between them; the husband died, leaving a son, who died in the wife's lifetime. The power was held not to be confined to the moment of the husband's death, but to be exercisable at any time during the widow's lifetime; (and see *Dalby* v. *Pullen*, 2 Bing. 144; *Eden* v. *Wilson*, 4 H. L. C. 283; and Sug. Pow. 267).

The two following cases, however, appear to be at variance with this rule. In *Re Walsh's Trusts* (1 L. R. Ir. 320), policies of assurance on the life of A. were settled on trust for the children of A. as A. should by will appoint, and in default of appointment the trustees were to pay the money assured by the policies to the children of A. in such shares as the trustees should order or direct. Chatterton, V.-C., held, on the construction of the deed, that the trustees' power only arose when they had received the money, and that their power was one of distribution, not of appointment. The Vice-Chancellor treated the reservation of the testamentary power by A. as showing that the trustees could never have been intended to interfere with the funds by any act of theirs during A.'s life. The reasoning is not altogether satisfactory, for the trustees could not divide the money until they had got it, which was necessarily not until after A.'s death; and his power was paramount to theirs: nor is it easy to see what is the distinction between a power of distribution and

Cases *contra.*

a power of appointment. But the case turned really upon the construction of the particular instrument.

In *Blight* v. *Hartnoll* (19 Ch. D. 294), Fry, J., is reported to have said: "I think that when a power of appointment among a class of people is given, the appointor must know the class: must be able to ascertain the class amongst whom he or she is so to divide the property. It is a discretionary power, to be exercised with reference to the respective circumstances and merits of the persons who are to take; and that cannot be exercised when the persons are not known. To use an illustration which I put during the argument; if a power were given to A. to appoint among his children who should be living at the return of B. from Rome, and that were exercised by A. before B. returned from Rome, it appears to me to be a bad exercise of the power."

In the case before the Court, there was a power to appoint the proceeds of sales of property directed to be sold at a period beyond that allowed by the rule against perpetuities, amongst a class to be then ascertained: and this was held bad for perpetuity. The statement above quoted was, therefore, not necessary for the decision of the case. It is a question of intention on the construction of the document creating the power; and it is submitted that the general statement at the commencement of the foregoing quotation is too wide. If it were correct, no one could appoint under the ordinary power of appointment amongst issue, until all possible issue had been ascertained: and it has never before been suggested that an appointment to a child under the usual power to appoint among children or issue is bad, because other children or issue may be afterwards born.

The latest case on the subject is contrary to the statement of the law in *Blight* v. *Hartnoll*. In *Re Coulman*, *Munby* v. *Ross* (30 Ch. D. 186), a power of appointment among children or issue was exercised by appointing to children for life, with remainder to their testamentary appointees, with remainder to their next of kin, exclusive of the husband of any female child. Some of the children were alive at the date of the creation of

the power; and as to these shares Pearson, J., held that, if on the death of the tenant for life the next of kin happened to be issue, they would be objects of the power, and the appointment would be good. *Blight* v. *Hartnoll* was not cited.

10. A power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled; for until then it has in fact no existence. Power to arise on a contingency.

In *Meyrick* v. *Coutts* (Sug. Pow. 266), there was a devise to A. for life, and after her decease a power to trustees to sell and pay the money among the children of B. The Court held that a sale could not be made until after the death of A.

In *Blacklow* v. *Laws* (2 Ha. 40), a testator directed an estate to be sold after the death of A. Under the decree of the Court in a suit to administer the trusts of the will (there being no debts unpaid, and the persons interested in the proceeds being not *sui juris*), this estate was directed to be sold. It was held, however, that the Court could not compel the purchaser to accept the title.

In *Johnstone* v. *Baber* (8 B. 233), a testator devised his advowson to trustees on trust to sell on the death of A. A. was the incumbent, so that on his death no sale could be made until the vacancy was filled up. It was held that the Court had no jurisdiction to authorize a sale in the lifetime of A. on the ground that it would be beneficial to the parties; (and see *Mosly* v. *Hide*, 17 Q. B. 91; *Shaw* v. *Borrer*, 1 Keen, 559).

In *Want* v. *Stallibrass* (21 W. R. 685; L. R. 8 Ex. 175), there was a devise to trustees for A. for life, "and from and immediately after his decease" to sell. The Court of Exchequer treated it as clear that the power did not arise until A.'s death. If the tenant for life and the persons entitled to the proceeds of the sale are all *sui juris*, they can of course make a good title; but the power will not in such case come into operation.

But in *Uvedale* v. *Uvedale* (3 Atk. 117), there was a devise of lands to the testator's wife for life, and after her decease the testator willed the same should be sold. Lord Hardwicke said that the words "after her decease" were not put in to postpone the sale; and he held that a sale might well be made in the lifetime of the widow. It is to be observed, however, that the bill in this case was filed by the widow, who was a specialty creditor of the testator; (see, too, Co. Litt. 113 a, n. 2; and *Alford* v. *Alford*, cited 2 P. W. 230).

So, also, in *Ashford* v. *Cafe* (7 Sim. 641), a testator gave a fund to trustees for A. for life, and after her death to transfer it to B. in case she should be *then* unmarried; but if she be then married, on trust to transfer the same to such persons as she should, notwithstanding coverture, and whether sole or married, appoint; and in default, for her executors and administrators. B., being then married, died in A.'s lifetime, having made a will in execution of the power. This was held good: *sed qu.* (see Sug. Pow. 265).

Condition precedent to power.

Where the performance of an act is made a condition precedent to the exercise of a power, and such performance subsequently becomes by act of the law impossible, the power cannot be executed. If the performance of a condition precedent be prevented, no matter how, and the condition does not take effect, that which was conditioned upon it cannot possibly take effect either.

In *Lord Shrewsbury* v. *Hope Scott* (6 C. B. N. S. 1, 220), lands were settled by Act of Parliament so as to be inalienable; but power was given to each tenant in tail to alien on condition of his making the declaration and taking the oaths prescribed by 30 Car. 2, c. 2, and 11 & 12 Will. III. c. 4, within six months after attaining 18, and continuing a Protestant. These last-mentioned Acts were repealed. It was held that the only effect of the repeal was that the power could not take effect.

In *Earle* v. *Barker* (11 H. L. C. 280), a testator gave his residuary estate to his executors on trust for A. for life, and after the death of A., *provided he shall leave any child or children*

him surviving, on trust for such persons generally as A. should appoint by will; but if A. should die without leaving any child or children him surviving, and should not previous to his death make such appointment as aforesaid, then on trust for B., C., and D. A. died without ever having had a child, leaving a will by which he purported to execute the above power. It was held (affirming the Master of the Rolls, 33 B. 353), that A. never having had a child, the condition on which the power was founded had not occurred, and the power never came into existence: the will of A. was therefore inoperative as an appointment, and the property went as in default. Lord Westbury thought that the testator meant to provide for a double contingency by the gift over: if there should be no child, in which case there would be no power, or if there should be a child, but the power should not have been exercised, then the gift over was to take effect.

In *Re Verschoyle's Trusts* (3 L. R. Ir. 43), under a marriage settlement there was a power for the wife, if she survived her husband and there should not be more than three children of the marriage, "*then and in such case*," by deed or will or codicil to appoint one moiety of the fund to any person or persons. The wife and three children out of five survived the husband, and the wife then appointed to a trustee for herself. This was held to be a bad exercise of the power, which could only arise in the event of there being no more than three children born of the marriage.

In *Wilkinson* v. *Thornhill* (61 L. T. 362), there was a power "if there should not be more than two children," to raise £5,000 —"if there should be more than two," to raise £3,000. There was no child, and it was held that the £5,000 was raiseable.

No distinction between real and personal estate, *semble*.

There appears to be no difference between real and personal estate in this respect. In *Earle* v. *Barker* the property seems to have been a mixed residue; there is no question of property vesting, as to which different principles are applicable, according as it is real or personal estate (2 Jarm. on Wills, 1). The question is, has the event happened or the condition been fulfilled, upon which, and upon which only, the power was to

arise? If it has not, there is no power to be exercised, whether the property be real or personal.

The important distinction would appear to be between cases where the power is not to arise except on the happening of an event or the performance of a condition; and cases where the power is called into existence, but its effectual execution is made dependent on some condition subsequent. In the former case, as the power never comes into existence at all, it can never be exercised, and the nature of the condition precedent to its creation can make no difference. The case is analogous to that of a condition precedent to the vesting of real estate, as to which Baron Parke (4 H. L. C. 120) says: "Supposing (the condition or contingency) to be illegal, if it be precedent, and the event does not happen, or if it be impossible, and therefore cannot happen, the party never obtains the estate." But in the latter case, when the power is called into existence, but its execution is made contingent on some event or condition, it will be a question of intention in each case whether such event or condition was intended to be so indispensable to the execution of the power as to render any execution impossible, if the event or condition becomes itself impossible (cf. 2 J. & L. 539).

Proviso qualifying mortgagee's power of sale.

With reference to the proviso on the power of sale (which was formerly expressed in mortgage deeds, and which is now implied by sect. 20 of the Conveyancing Act, 1881, to the effect that the power shall not be exercised until notice has been served on the mortgagor, and which proviso was itself restricted by a clause which protected purchasers from the necessity of ascertaining whether the power had in fact arisen), it has been held that where the purchaser has notice that the condition precedent to the power has not been fulfilled—*i. e.*, that the necessary notice has not been given—the exercise of the power is bad, and the protecting clause has no effect (*Parkinson* v. *Hanbury*, 1 Dr. & Sm. 143; *Selwyn* v. *Garfit*, 38 Ch. D. 273; and see *Forster* v. *Hoggart*, 15 Q. B. 155). And it is conceived that this doctrine applies equally to the power of sale implied by the Conveyancing Act, 1881 (sects. 19, 20, 21).

It seems doubtful whether a direction to sell real estate for the

payment of debts, *in case the personalty should be insufficient*, is a conditional power, or an absolute charge of debts.

Power of sale in case of deficiency of personalty to pay debts.

In a case where a testator said "in case it should fully and sufficiently appear" that the executrix should not find sufficient personalty to pay his debts, then he desired that she should sell Whiteacre, it was held that the power of sale did not arise until the deficiency of the personal estate appeared in the manner specified by the will (*Dike* v. *Ricks*, Cro. Car. 335). But Lord Romilly has held that, where a testator says "if my personal estate is insufficient to pay my debts, there shall be a charge on my real estate," it is no more than saying, "I charge my real estate with payment of my debts," for the personal estate is primarily liable, and the charge can never arise until the executors find the primary fund deficient (*Greetham* v. *Colton*, 34 B. 615).

The distinction, depending on the words "fully and sufficiently," seems a narrow one. The Courts, before real estate was made assets for the payment of all debts, probably felt it incumbent on them to construe more strictly charges in form conditional, which imposed a burden to which the land would not, without such charge, be subject; but since 3 & 4 Will. IV. c. 104, the conditional form is of less importance, as the real estate will be applicable for the payment of debts in a due course of administration in any case. It is rather a question of convenience, and probably the Courts would follow the later decision, unless in a case exactly similar to that in *Dike* v. *Ricks*, or unless the personalty has not proved deficient, and the purchaser has notice of this (*Carlyon* v. *Truscott*, 20 Eq. 348).

Although part of condition unfulfilled.

And Lord Romilly has held a power in form conditional exerciseable, although part of the condition was not fulfilled. In *Davidson* v. *Rook* (22 B. 206), a testator, having two children, empowered his widow, if his children should conduct themselves to her satisfaction up to the age of 25, *and marry with her approbation, but not otherwise*, to give them £1,000 each for the purpose of setting out in the world. The Master of the Rolls held that the widow had power, on the children attaining 25, to give them £1,000 respectively, although they were unmarried.

Lord St. Leonards (Pow. 266) disapproves of this decision, and says the words in italics should not have been disregarded. It may perhaps have been considered that the paramount intention was to enable the children "to set out in the world," a proceeding which has no necessary connection with marriage.

Can the event on which the power is to arise be accelerated by the parties?

11. The question whether the event on which the power is to arise can or cannot be accelerated by the act of the parties, depends on the nature of the power. There is a distinction in this respect between powers which are a burden on the estate, and powers which are simply administrative.

Burdensome powers.

The law is stated in *Truell* v. *Tysson* (21 B. 444): "It seems to be, if not settled, at all events the better opinion, and one which the Court would be disposed to act on, that when a power to charge an estate is given under circumstances like these—that is, when there are two successive life estates and an estate in remainder, and a power is given to the tenant for life in possession to charge—that power cannot be exercised by the second tenant for life upon the first surrendering his life estate, so as to bring the second into possession. The reason is obvious, that it might be done for the purpose of fraud, and for multiplying the charges on the estate against the remainderman. The testator has given the property in such a way that the estate of the person in remainder shall not be charged by the second tenant for life, until he comes into possession of the estate on the death of the first tenant for life. If it were otherwise, the result might be this: the first tenant for life might surrender his estate, and so enable the second to create the charge, and he might afterwards die before the first tenant for life, and a charge might thus be created which was never contemplated, and which could never have taken effect under the strict words of the settlement; great frauds might thus be committed. But I am of opinion that this reasoning does not apply to a power of sale; a charge diminishes the estate of the remainderman, but a sale or exchange does not; and the reasoning, as applicable to accelerating a power to charge, fails in regard to a sale or exchange. In the case of a charge, it is the intention of the testator that the interest of the remainderman shall not be

Administrative powers.

diminished, except in the particular case specified. But in the other case there is no diminution of his interest, but only a change in the property. The same presumption, therefore, does not arise" (Sug. Pow. 269).

The reasoning applicable to the acceleration of powers to charge would apply to ordinary powers of selection and distribution: the persons entitled in default of appointment occupy the same relation to the objects of the power as the remaindermen in cases of powers to jointure occupy to the tenant for life and his wife.

Reversions may be sold.

12. The mere fact of the subject of a power of sale being a reversion, will not prevent the exercise of the power, if it be given immediately.

In *Blackwood* v. *Borrowes* (4 Dr. & War. 441, 468), Lord St. Leonards says: "It is settled by the authorities that, unless there is a restriction against an immediate sale, the power may be exercised at once, so as to increase the interest of the tenant for life at the expense of the remainderman; for if, instead of waiting for the expiration of the particular estate, the reversionary interest be sold, it must of course be sold at a much less price than the estate in possession would have produced. The authorities have, however, settled the question, and I think wisely, that if there be no intention expressed, the power may be exercised immediately." In that case, the reversion, after the determination of two life estates, was settled on the marriage of the reversioner; the settlement contained a power of sale; and it was held that such a power might be exercised before the reversionary interest became an estate in possession; (and see *Clark* v. *Seymour*, 7 Sim. 67).

In *Giles* v. *Homes* (15 Sim. 359), a reversion of a moiety of a farm was settled on a marriage, and the trustees were empowered to sell it when in possession. The settlement contained a covenant by the husband and wife to convey any other share or interest in the said farm which they might afterwards acquire to the trustees, so that it might become vested in them upon the trusts and subject to the powers declared of the settled moiety. After the first moiety had fallen into possession, a moiety of the

other moiety came to the wife by descent, subject to a life estate. It was held saleable under the power; the suspension of the power over the first moiety did not extend to the after-acquired share; (and see *Tasker* v. *Small*, 6 Sim. 625; 3 M. & C. 63).

Execution of power over legal estate by contingent persons.

13. A general power, affecting the legal estate in land, given to a contingent person, could not, under the old law, be exercised until the person to exercise it was determined by the event.

By deed before 8 & 9 Vict. c. 106.

(*a*.) As to its execution by deed.

A contingent interest and a contingent right to exercise a power stand on the same footing; consequently, the same principle that made contingent interests inalienable (before 8 & 9 Vict. c. 106) was held to extend to prohibit the exercise of a contingent power over the legal ownership; in other words, as an use limited to the survivor of two persons could not, under the old law, be aliened until after the survivorship, so a power to declare an use, given to the survivor of two persons, could not be exercised except by the actual survivor. But in equity this rule never prevailed. A power to the survivor of three persons to declare a trust for his own benefit is not distinguishable from a trust for the benefit of the survivor; and, as a contingent equitable interest was always alienable by deed or by will, it follows that a person who has a contingent right to appoint an equitable estate for his own benefit could always exercise the power, subject to the contingency (see Lord Westbury's judgment in *Thomas* v. *Jones*, 1 D. J. & S. 63).

Different rule in equity.

It follows from this that contingent legal interests, being now, by 8 & 9 Vict. c. 106, made alienable, stand on the same footing as contingent equitable interests before the Act, and that powers given to contingent persons of appointing legal estates, being governed by the same principles, are also exerciseable in the same way that powers given to contingent persons of appointing equitable estates have always been; but this has not been yet expressly decided.

(*b.*) As to its execution by will.

By will before the Wills Act.

Before the Wills Act, a power affecting the legal estate, given to a contingent person, was not well exercised by the will of that person made before the contingency determined—for the will spoke from its own date, at which time the power was in the nature of a contingent use—and such uses were only devisable when they were descendible, and this they could not be, unless the person who was to take was certain (*Selwyn* v. *Selwyn*, 2 Burr. 1131). This was so decided in *Doe* v. *Tomkinson* (2 M. & S. 165).

Not applicable to equitable estates.

This did not apply to equitable interests, and therefore not to powers affecting the equitable estate only. But since the Wills Act (1 Vict. c. 26), a will speaks from the death of the testator, with reference to the estate comprised in it; and consequently a will, made by the actual survivor of two donees of a general power during their joint lives, operates as from the date of the testator's death, and therefore is effectual.

In *Thomas* v. *Jones* (1 D. J. & S. 63), a general equitable power of appointment was given to the survivor of A. and B. A., who was a married woman (with testamentary capacity under her settlement), by her will, made in 1838 and in the lifetime of B., who subsequently died in A.'s lifetime, made a general devise of her real estate. This was taken as executed immediately before her death; the general devise therefore operated as a good appointment under the power which she had then.

Execution of powers by contingent persons by will since the Wills Act, and by deed since 8 & 9 Vict. c. 106.

It is submitted that the rule to be deduced from Lord Westbury's judgment in *Thomas* v. *Jones* (1 D. J. & S. 63), and from the general principles of law, although no cases have as yet expressly decided it, is that

> A general power of appointment, whether affecting the legal or equitable estate, may now be well exercised by deed or will, by a contingent person, who, in the event, proves to

be the person actually entitled to exercise the power.

Powers which prove to be non-existent. *E.g.* power of married woman arising on death of husband.

14. But the case of a power, which has no existence in the events that happen, must be distinguished. Thus, the Wills Act gave a married woman no greater testamentary power than she possessed before. Apart from the Married Women's Property Acts, she could only make a will disposing of her separate estate, or disposing of personal property with the assent of her husband, or executing a power. If, therefore, her power only arose on the death of her husband, her will, made during his lifetime, of property which would become her own only if she survived him, must fail if she survived him. It could not pass the property as a will, for she had no power to make a will; and it could not execute the power, because in the event supposed such power never had any existence (*Willock* v. *Noble*, L. R. 7 H. L. 580; *Trimmell* v. *Fell*, 16 B. 537).

In *Price* v. *Parker* (16 Sim. 198), stock was transferred to trustees on trust for such persons as A. and his wife should appoint, and in default for the wife for life; and if she should survive her husband, for her absolutely; but if she should die first, on trust for him for life, and, subject thereto, for such persons as the wife, notwithstanding coverture, should by will appoint. The wife, in her husband's lifetime, made a will in exercise of the last-mentioned power, but survived her husband. Probate of her will was on her death limited to property of which she had power to dispose. It was held to be inoperative; the event of her husband's death before her left no power for her to execute. It is to be observed that the limitations in these cases were those frequently inserted in marriage settlements; it would seem advisable, in order to prevent the recurrence of such questions, to give the wife a testamentary power exerciseable in any event; and this is the course now usually adopted.

Secus, if property settled to her separate use if she survive.

If, however, the property is settled to her separate use, in the event of her surviving her husband, her will is effectual. Thus, in *Bishop* v. *Wall* (3 Ch. D. 194), personal property was settled

upon trust for the wife's separate use during her life without power of anticipation; and in default of issue (which happened) upon trust, if she survived her husband, for her separate use; but if she predeceased her husband, for such of her relations as she should, notwithstanding coverture, by deed or will appoint. The wife made a will during her husband's lifetime, and thereby, by virtue of the said power and of every other power, she disposed of all her property. She survived her husband and never republished her will; and it was held that, as both capital and income of the settled property belonged to her for her separate use, she had power to dispose of the whole by will made during coverture.

Effect of M. W. P. Act, 1882.

The Married Women's Property Act, 1882 (sect. 1, sub-sect. 1), enacts that "a married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing, by will or otherwise, of any real or personal property as her separate property in the same manner as if she were a *feme sole*, without the intervention of any trustee." The apparent generality of this clause has been considerably limited by the construction put upon it by the Courts. Thus, in *Re Price*, 28 Ch. D. 709, it was held that the Act did not enable a married woman to dispose by a will, made during coverture, of property left to her by her husband's will, and which necessarily could not come to her until after the coverture had ceased; (and see *Re Smith*, *Clements* v. *Ward*, 35 Ch. D. 589; *Re Wilson*, 26 W. R. 848). And the 19th section of the Act has had a construction put upon it which practically excludes from the Act property which would have been subject to a marriage settlement, if the Act had not passed (see *Re Whitaker*, 34 Ch. D. 227; *Hancock* v. *Hancock*, 38 Ch. D. 78).

In *Re Taylor*, *Whitby* v. *Highton* (58 L. T. 843), a woman, married in 1867, had, under her marriage settlement, a general power, if she predeceased her husband, of appointment by will or codicil over personal property which, in the event of her surviving, was to be held upon trust for her absolutely. In 1883 she made a will in exercise of her power, disposing of "all the property, of whatever nature, comprised in the said settle-

ment, and over which I have any power of appointment or disposition by will." In 1885 her husband died, leaving to his wife real and personal estate; and in the same year she made a codicil as follows: "Codicil to my will. Certain property having become mine by the will of my late husband, to wit" (specifying certain real estate), "I do give the whole of the aforesaid houses and lands to my brother for his sole use and benefit." The testatrix died six weeks later. Chitty, J., held that the codicil did not enlarge the scope of the will so as to make it include any property not originally included; and that as to the property acquired under the husband's will, other than that specifically devised by the codicil, the testatrix died intestate. And, in order that a codicil made after the husband's death may operate to republish a will, it must contain some evidence of intention to republish (*Re Smith*, *Bilke* v. *Roper*, 63 L. T. 448; 39 W. R. 93).

But a will which would operate as an effectual disposition of property settled by deed or will to the separate use of a married woman is equally effectual to dispose of property which becomes her separate estate by virtue of the Married Women's Property Act. The phraseology of the Act appears to have been taken from Lord Thurlow's judgment in *Hulme* v. *Tenant* (1 B. C. C. 16).

Thus, in *Re Bowen*, *James* v. *James* (1892, 2 Ch. 291), a woman married in 1839, and having a general power under her settlement, made a will in 1872, exercising her power and bequeathing her residuary real and personal estate. In 1884 she became entitled, as next of kin of a niece, to a sum of £2,440, and died in 1885. It was held that her will effectually disposed of this sum.

Limited powers cannot be executed by contingent persons.

15. The last rule mentioned in sect. 13 must not be taken as applicable to limited powers. Lord Westbury expressly excludes powers which are given for the benefit of special objects, and which are in the nature of trusts; or which are given to trustees to be used, as sound discretion may decide, at a particular period. General powers are, for most purposes, equivalent to absolute ownership; and the technical objection to the alienation of

contingent legal estates being now abolished, there is no reason for continuing the restriction on the exercise of contingent general powers. But this does not apply to limited powers, which are exerciseable for the benefit, not of the donee, but of the objects of the power (see Sug. Pow. 120). Consequently, the law, so far as concerns limited powers, remains unaltered, and the rule is, at any rate as to appointments by deed, that

A limited power, given to a contingent person, cannot be exercised until the person to exercise it is determined. By deed.

In *Macadam* v. *Logan* (3 Bro. C. C. 310), a power of appointing a sum of stock amongst the children of a marriage, which was given to the survivor of the husband and wife, was held to be not well exercised by a joint appointment.

In *Care* v. *Care* (8 D. M. & G. 131), there was the usual joint power, in a marriage settlement of personalty, to appoint among children, given to the husband and wife; and in default of such appointment, as the survivor, *after the decease of the other*, should appoint; the husband made a will during his wife's life, exercising the power, and survived her. It was held that, by the very terms of the power, the appointment was bad, and that the 24th section of the Wills Act did not apply; but this decision seems to rest on the peculiar wording of the power. In *Re Twiss* (15 W. R. 540), Lord Cairns said that a power of revocation of an appointment to a child under the usual power in a settlement would need express words to enable it to be executed by the ultimate survivor during the joint lives. Turner, L. J., seems to doubt whether such a power could be given at all. In *Re Moir* (46 L. T. 723), Bacon, V.-C., held that a limited power, exerciseable by A. and B. during their joint lives by deed, and in default of such appointment by the survivor of them by deed or will, was not well executed by the will, made during the joint lives, of the actual survivor; (and cf. *Re Wells*, 42 Ch. D. 646; and *post*, sects. 40 and 41). By will.

Period for executing determinable powers.

16. A power, determinable on the happening of any event, must be exercised before such event happens.

For this purpose a will speaks from the death of the testator.

In *Potts* v. *Britton* (11 Eq. 433), a fund was held on trust, in the events that happened, for B. P. for life, with remainder for such persons of a certain class as B. P. should by deed or will appoint, and it was provided, that if B. P. should commit any of certain specified acts, his life estate should determine, and the trust fund go as if he were actually dead, and all powers therein contained should be thenceforth exercised as if he were then dead. B. P. exercised his power by will, but subsequently committed an act of forfeiture; the appointment was held invalid; (see *Cooper* v. *Martin*, 3 Ch. 47; *Parsons* v. *Parsons*, 9 Mod. 464; *Re Aylwin*, 16 Eq. 585). A power of revocation to be exercised by A. and B., or the survivor of them, *during their joint lives*, determines on the death of either A. or B. (*Re Twiss*, 15 W. R. 540).

In *Re Borrowes* (2 I. R. Eq. 468), a testator devised lands to his two brothers successively for life, and authorized them "when and as soon as they shall respectively become seised of an estate of freehold in possession," by deed or writing "to be made upon or previously to their marriage," to charge the estates with a jointure and gross sum for younger children. The testator died in 1834; the brother, who took the life estate under his will, had married in 1825; he purported to exercise his power of charging given by the testator's will, in 1844. The Court considered that the power authorized ante-nuptial settlements only, and held the execution in 1844 to be invalid.

Power of sale within five years.

But in *Pearce* v. *Gardner* (10 Ha. 287), a power to trustees of a will to sell, with all convenient speed and within five years (but without any words forbidding a sale after that period), was held not to be restrained to five years; (and see *Cuff* v. *Hall*, 1 Jur. N. S. 972). As between the trustees and the *cestuis que trust*, the onus of showing that the latter are not prejudiced lies on the trustees; and people who deal with trustees raising

money at a considerable distance of time and without an apparent reason for doing so, must be considered as under some obligation to inquire and look fairly at what they are about (*Stroughill* v. *Anstey*, 1 D. M. & G. 654; *Devaynes* v. *Robinson*, 24 B. 86).

Power of appointment when there is an only object.

17. A power of appointment among a class, to whom the property is limited in default of appointment, is not necessarily extinguished because there is an only object; it depends on the nature of the power; if it be merely to limit the proportions in which the members of the class are to take, it cannot of course be exercised if there is an only object (*Campbell* v. *Sandys*, 1 S. & L. 281, 293). And if the sole object of the power is not the person entitled in default of appointment, the only way in which he can take is by an execution of the power. If the power is a power to appoint among children "in such proportions, with such conditions, restrictions, and limitations, &c.," it may be well exercised although there is an only object.

In *Bray* v. *Bree* (2 Cl. & F. 453), a fund was vested in trustees on trust for all and every the child and children of a marriage, in such shares and at such age or ages and subject to such conditions and limitations as the wife should appoint. There was one child only: the wife appointed to such child for her separate use for life, and after her decease to her general appointees, and in default of appointment, to the child's executors and administrators. This was held good; and the child (a married woman) having appointed the fund by will, her appointee was held entitled as against her husband.

Defeasible appointment.

But a limitation in default of appointment to the only object of a power cannot be defeated by an appointment to such object which fails in the event that happens. The estate in default can only be defeated by an appointment which takes effect, and only to the extent to which such appointment does take effect. This appears to be the ground of the decision in *Doe* v. *Denny* (cited 2 Wils. K. B. 337). In that case lands were limited by marriage settlement to the use of such children of the marriage for such estate and estates, and subject to such powers, provisions, conditions, and limitations as A. should appoint, and in

default of appointment to the use of the children of the marriage in fee, and in default of children to the right heirs of A. There was an only child of the marriage, a daughter, and A. appointed to her in fee, with an executory limitation over in case she died under 21. The child survived the donee of the power, but died under 21; it was held that her heirs were entitled, and not the executory appointee. In *Roe* v. *Dunt* (2 Wils. K. B. 336), which was similar to *Doe* v. *Denny*, the Lord Chief Justice thought that a single child in such a case might be made a tenant in tail: the reporter, however, doubts this. Lord St. Leonards (Pow. 415) thinks there is no ground for the doubt; and that, at any rate, where the power is to appoint for such estate and estates as the donee pleases, the words of the power cannot be satisfied without giving the donee a power to limit the quantity of estate to be taken by a single child, the only object of the power.

The appointor cannot of course prevent the estate appointed from merging in any larger estate to which the object may be entitled in default of appointment; *e. g.*, if the appointment is for life, and the limitation in default is to the object in fee. This would not apply to an appointment to the object in tail, as estates tail do not merge in the fee (13 Edw. I. c. 1).

Extent to which a power is exerciseable, when one or more of the objects dies.

18. Lord St. Leonards deduces a rule from *Reade* v. *Reade* (5 Ves. 744), which he thus states (Pow. 421): "Where a power is given by will to appoint amongst several objects, and the estate in default of appointment is given to them as tenants in common, the death of any of the objects in the life of the testator will *pro tanto* defeat the power and devise over, so that the power and devise over will only remain as to the shares of the survivors."

The case, however, is very unsatisfactory (see *Butcher* v. *Butcher*, 1 V. & B. at p. 92; 2 Jarm. 265). It is submitted that the decision must have turned on the impossibility (under the law as it then stood) of excluding any object of the power from a substantial share of the property to be appointed. Since the Act 11 Geo. IV. & 1 Will. IV. c. 46, and the Act 37 & 38 Vict. c. 37, it is submitted that any object of a power, although

entitled by name to a share in default of appointment, can be excluded. Apart from the Acts, an appointment under a power authorizing exclusion could be made of the whole, although the property was limited in default of appointment to a class of whom one or more had died (*Woodcock* v. *Renneck*, 4 B. 190; 1 Ph. 72; *Boyle* v. *B. of Peterborough*, 1 Ves. J. 299). Thus, in the ordinary case of a marriage settlement, where property is held in trust for such of the children of the marriage as the parents shall appoint, and in default of appointment for the children at 21 or marriage, an appointment to one or more of the children is undoubtedly good, although other children have attained 21. Assuming the power to authorize exclusion, it can make no difference whether the persons excluded are living or dead, whether they would have taken, if not displaced by the execution of the power, as joint tenants or tenants in common, or as persons named, or as members of a class. The very object of the power is to enable the creation of estates or interests paramount to, and in defeasance of, the estates or interests limited in default of appointment: and the actual nature and extent of the estates or interests defeated can have no bearing on the extent of the power, which must depend on the construction of the words creating it. And in *Re Ware*, *Cumberlege* v. *Cumberlege-Ware* (45 Ch. D. 269), two legacies of £10,000 each were left to J. and A. for their lives to be "left by them respectively after their deaths in such proportions as they may appoint to their brothers or sisters, Charles, Samuel, and sister Catherine: on failure of appointment, to be equally divided between the three or their respective representatives." Catherine died before J., and J. by codicil appointed his £10,000 as to one-third to Charles and as to two-thirds to Samuel. And A. subsequently appointed her £10,000 to Charles and Samuel equally. Stirling, J., held that the appointments were good.

In *Paske* v. *Haselfoot* (33 B. 125), the Master of the Rolls said, that it is settled that if a power of appointment is given to a person to divide a fund amongst the members of a particular class, the death of some members of that class before the exercise of the power will not prevent the donee of the power

from exercising it in favour of the surviving members of the class, even though, if the deceased persons had been alive, they must have had a share. The difficulty in that case was that the will especially directed that the appointment should be made to a person by name, and to others as a class. The person named died, and the donee appointed among the members of the class; it was held good; (and see *Houston* v. *Houston*, 4 Sim. 611).

Powers need not be exercised *uno flatu*.

19. A power may in general be executed by different appointments made at various times.

This rule held good in cases where, prior to Lord Selborne's Act (37 & 38 Vict. c. 37), the power was non-exclusive, and an appointment, not exhausting the whole, did not give a share to every object of the power (*Wilson* v. *Piggott*, 2 Ves. J. 351; *Bristow* v. *Warde*, *ibid.* 336).

Were this otherwise, under the ordinary power in a marriage settlement to appoint trust funds among children, no appointment could be made to a child on marriage or settlement in life, until all the other children had also become of such an age that their future destination could be ascertained and fixed (*Cuninghame* v. *Anstruther*, L. R. 2 Sc. & D. 223; Co. Litt. 237 a; *Digges' case*, 1 Co. Rep. 173; *Omerod* v. *Hardman*, 5 Ves. 722; Sug. Pow. 272; *Zouch* v. *Woolston*, 2 Burr. 1136; *Doe* v. *Milborne*, 2 T. R. 721; but see *Brown* v. *Nisbett*, 1 Cox, 13, observed on in *Webster* v. *Boddington*, 16 Sim. 177).

And where there is a primary power, and in default of its execution a secondary power, a partial exercise of the primary power does not preclude an exercise of the secondary power over the portion of the fund which remains unaffected by the exercise of the primary power (*Mapleton* v. *Mapleton*, 4 Dr. 515), where the Vice-Chancellor, on the strength of Lord St. Leonards' strictures, refused to follow *Simpson* v. *Paul*, 2 Eden, 34.

By sect. 55 of the Settled Land Act, 1882, it is expressly enacted that the powers thereby conferred on a tenant for life or

trustees, or the Court, or the Land Commissioners, are exercise-able from time to time.

20. One consequence of the rule stated in the last section, and of the doctrine of equity, that a mortgage is merely a security for a debt, is that the donee of a general power of appointment or revocation, who exercises it by way of mortgage in fee, does not thereby fully execute the power in equity, although he has at law appointed the whole fee: the equity of redemption remains unappointed: but when this is reserved to persons other than those entitled under the deed creating the power, as, for instance, to the appointor, his heirs and assigns, the question arises whether this reservation is to be taken as an appointment of the equity of redemption, so as to defeat the persons entitled in default of appointment.

It is in such case a question of intention, but by analogy to mortgages made in cases not under powers, where the right to redeem is limited to a person who had either no interest, or a partial interest only, in the land at the time of the mortgage, and the rule which holds with respect thereto, viz., "that a strong indication of intention is necessary to transfer the beneficial ownership of the equity of redemption from the person entitled to the beneficial ownership of the estate at the time of the mortgage, or to vary his rights" (Co. Litt. 208 a, n.), it may be laid down that—

When the reservation of the equity of redemption operates as an appointment.

> In an appointment by way of mortgage, the reservation of the right to redeem to persons other than those to whom the estate is limited in default of appointment in the deed creating the power, is not of itself an appointment of the equity of redemption (*Ruscombe* v. *Hare*, 2 Bl. N. S. 192; 6 Dow. 1).

Presumption in favour of its operating only as a charge.

The question in these cases is whether the mortgage operates only to charge the estate comprised in it, or operates also, beyond that purpose, to alter the limitations of the estate

subject to the charge. "This question depends upon the intention to be collected from the deed." There cannot, therefore, be any general rule: each case must depend upon its own particular circumstances; and the authorities "furnish us with no further guide than that the charge upon the estate being, of course, in cases of this nature the immediate motive of the deed, the Court will not impute the further intention to change the limitations, unless that further intention appears by recital or other special circumstances; and that the mere fact of the reservation of the equity of redemption deviating in a slight or partial degree from the original limitations of the estate does not of itself furnish sufficient ground for imputing the further intention to change the limitations, but is rather to be ascribed to inaccuracy or mistake" (*per* Turner, L.J., in *Heather* v. *O'Neill*, 2 De G. & J. at p. 414).

Presumption strong where wife joins in mortgage.

The presumption that the object of the deed is only to effect the charge is perhaps most strongly illustrated in cases where a wife joins with her husband in mortgaging her own estate.

"The principle is this—that in a mortgage, the mere form of reservation of the equity of redemption is not of itself sufficient to alter the previous title. In such a case (where fraud is out of the question) it is supposed to arise from inaccuracy or mistake, which is to be explained and corrected by the state of the title as it was before the mortgage. This is conformable to the principle upon which other cases have been determined. If a lease be made by tenant for life, under a power created by a settlement, and a rent is reserved to the lessor and his heirs (which is not an unusual blunder), those words are interpreted by the prior title, and applied to such persons as, under the settlement, may be entitled to the estate in remainder, and not to the heir of the lessor, unless he happen to be such remainderman. In all such cases the words used are to be interpreted according to the title when the instrument is executed. So where an estate belonging to the wife is mortgaged, and the equity of redemption is reserved to the heirs of the husband, there is a resulting trust for the wife and her heirs" (*per* Lord Redesdale, 1 Bl. 114).

But it is, however, only an equity, and parol evidence is therefore admissible to rebut it by setting up another equity—for instance, that the money was borrowed for the use and benefit of the wife (*Lord Kinnoul* v. *Money*, 3 Sw. 202, n., 208, n.; *Clinton* v. *Hooper*, 3 B. C. C. 201; 1 Ves. J. 173; *Hudson* v. *Carmichael*, Kay, 613; *Plomley* v. *Felton*, 14 Ap. Ca. 61). Presumption may be rebutted by parol evidence.

The following cases illustrate the principle stated in the foregoing rule: *Brend* v. *Brend* (1 Vern. 213); *Hipkin* v. *Wilson* (3 De G. & S. 738); *Stansfield* v. *Hallam* (29 L. J. Ch. 173); *Huntingdon* v. *Huntingdon* (2 Wh. & T. L. C.).

The same presumption arises where the mortgage is of the wife's leaseholds: and, in the absence of evidence to the contrary, the mortgage is held to be merely a security, and not to operate as a reduction into possession by the husband (*Clark* v. *Burgh*, 2 Coll. 221; *M'Cullagh* v. *Littledale*, 9 I. R. Eq. 465; and see *Pigott* v. *Pigott*, 4 Eq. 549, where the mortgage was of redeemed land-tax which before marriage had belonged to the wife; and see *Re Betton*, 12 Eq. 553; *Wood* v. *Wood*, 7 B. 183). Presumption arises on mortgage of wife's leaseholds.

The case of *Eddleston* v. *Collins* (3 D. M. & G. 1), turned on the evidence of intention to vary the estate of the wife in the equity of redemption by giving her husband power to create further charges (see *per* Turner, L.J., at p. 15; and see *Pitt* v. *Pitt*, T. & R. 180).

If the intention of the wife be clear that the husband should have her estate, he must of course have it; but it is an established principle, to be applied in deciding upon the effect of mortgages of this description, whether it be the estate of the wife, or the estate of the husband, if the wife joins in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of the estate, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife, or for the benefit of the Effect of wife joining in mortgage.

husband, according to the circumstances of the case (1 Bl. 126).

This passage must, however, be read with reference to the cases which had previously been discussed by Lord Redesdale; and it has been held not to warrant the proposition that a wife, who for the purpose of releasing her right to dower joins with her husband in mortgaging his freehold and allows the equity of redemption to be limited to the husband, his heirs, and assigns, has any further interest in the estate (see *Dawson* v. *Bank of Whitehaven*, 6 Ch. D. 218; *Jackson* v. *Parker*, Amb. 687; and *Meek* v. *Chamberlain*, 8 Q. B. D. 31).

The general doctrine, however, is, that equity considers an execution of a power of appointment or revocation which is made by way of security to let in a particular incumbrance, as an execution *pro tanto* only (see an opinion of L. C. B. Macdonald and V.-C. Shadwell, 2 Mer. 179, n).

In *Whitbread* v. *Smith* (3 D. M. & G. 727), A. settled estates by deed in 1817, to such uses as he and his wife should jointly appoint, and in default to the use of himself for life, with remainder to the use of his wife for life, with remainder to the use of his son in fee. A. and his wife made several mortgages, all, except one, limiting the equity of redemption consistently with the uses of the deed of 1817. In 1832 they made another mortgage, which limited the equity of redemption to A. and his wife, their heirs and assigns, or to such persons as they should direct. It was held that this proviso was not intended to vary the limitation of the equity of redemption, and did not defeat the limitation of the fee in the deed of 1817; (but see *Atkinson* v. *Smith*, 3 D. & J. 186, a case which Lord St. Leonards says it would be difficult to reconcile with *Whitbread* v. *Smith*, Pow. 285; and *Barnett* v. *Wilson*, 2 Y. & C. C. C. 407, which seems also to conflict with the last-named authority).

Evidence of intention to resettle.

21. But it will be otherwise, if there be other indicia of an intention to alter the destination of the estate, besides the mere variance in the persons to whom the reconveyance is to be made on repayment. Where the form of the equity of redemp-

tion has nothing to do with the limitation of the estate, where the limitation of the estate is perfectly distinct, the rules which have been established in the cases of resulting trusts do not in any degree apply (1 Bl. 128).

In *Rowel* v. *Walley* (1 Cha. Rep. 116), the wife joined with her husband in a mortgage of her lands by a deed containing a proviso and declaration that if the husband and wife, or either of them, or their heirs, executors, &c., repaid the debt, the fine to be levied in accordance with a covenant contained in the mortgage deed should enure to the husband and wife and the longest liver of them, with remainder to the right heirs of the husband. That was a case of distinct declaration, in no manner depending on the proviso for redemption, but defining the course in which the property was to be carried after the satisfaction of the mortgage. A fine was afterwards levied according to the agreement, and after the husband's death the widow filed a bill to redeem. It was determined that the subsequent declaration and limitation having no connection with the proviso for redemption, but declaring what should become of the property after the mortgage was satisfied, operated against the construction of a resulting trust for the benefit of the wife. It was held to be a distinct settlement, and that she had parted with her estate.

In *Jones* v. *Davies* (8 Ch. D. 205), land of the husband was settled on his marriage to such uses as the husband and wife should by deed jointly appoint, with remainder to the use of the husband and wife successively for life, with remainder to the use of the children of the marriage as the parents should jointly by deed, or as the survivor should by will, appoint, and in default of appointment to the use of the children as tenants in common in fee, with an ultimate remainder in default of children to the use of the husband's heirs and assigns. The husband and wife afterwards mortgaged the property, the equity of redemption being limited to the uses of the settlement; but the deed contained a declaration that the surplus proceeds of any exercise of the power of sale should be payable to the husband, his heirs, executors, administrators, or assigns. The mortgagee sold the property after the death of the husband; and it was held that

there was no ambiguity nor any mistake to be implied: "the proviso for redemption is clearly to the uses of the settlement, but a different trust is declared with regard to the surplus sale moneys": and the surplus was ordered to be paid to the husband's representatives.

In *Jackson* v. *Innes* (1 Bl. 104), lands were settled to the use of A. and his wife successively for life, with remainders over, and the deed contained a joint power of revocation and new appointment. A. and his wife mortgaged the lands for a term of years, and covenanted to levy a fine, to enure to the use of the mortgagee, his executors, administrators, and assigns, for the remainder of the term, subject to the proviso for redemption; and from and after the expiration thereof, to the use of A. and his wife for their lives, and the life of the survivor of them, with remainders over, inconsistent with those limited by the former settlement. Lord Redesdale said that the operation of the deed as to the mortgage term, and as to the limitation in fee, was wholly distinct, and did not in any way depend on each other. The question did not arise on the interpretation of the proviso for redemption, but on a distinct and subsequent clause. The term and the fee were kept distinct: the term was the security for the money: on its ceasing, the operation of the deed, so far as it declared the limitation of the estate subject to the term, remained perfectly distinct, and had no connection whatever with the existence of the term, which then would have ceased to exist. Lord Eldon concurred in this decision, although it reversed his own judgment in the Court below (16 Ves. 356; Sug. Pow. 278).

Recital not necessary, but intention must be clear.

Although it is not necessary, as once stated by Lord Eldon, that there should be an express recital in order to alter the destination of the estate, the evidence of intention must be clear. "If the equity of redemption is reserved as to part of the estate in one way, and as to another part of the estate in another way, the argument is very strong indeed in favour of these different limitations having been intended to mean different things, and even of both having been intended to mean exactly what they imported. It may be shown on the face of a mort-

gage deed that there is an intention to resettle the equity of redemption, but it must be shown by something which bears expressly on that identical point. I do not say that it must be stated in terms that there is an intention to resettle, but it must be shown unequivocally that there is the intention" (*per* V.-C. Wickens, *Re Betton*, 12 Eq. 557; *Barnett* v. *Wilson*, 2 Y. & C. C. C. 407; *Eddleston* v. *Collins*, 3 D. M. & G. 1; *Re Byron*, (1891), 3 Ch. 474.)

Intention to alter rights inferred from reservation of greater estate.

An intention to alter the rights of parties in the equity of redemption may be inferred where the mortgagor or party joining reserves a greater or more beneficial interest.

In *Anson* v. *Lee* (4 Sim. 364), a tenant in tail, with remainders over, suffered a recovery to such uses as he should by deed or will appoint, and in default to the uses of his will. He then mortgaged part of the estates in fee, limiting the equity of redemption to the prior uses; and afterwards joined in a transfer of the mortgage, reserving the equity of redemption to himself in fee. It was held that the last reservation had the effect of revoking the former uses, and giving the mortgagor a fee simple estate in the mortgaged property; (see Lord St. Leonards' criticism on the case, Pow. 345; and see *Atkinson* v. *Smith*, 3 De G. & J. 186).

Difference between mere mortgage and conveyance on express trusts.

There is some difference, too, between an ordinary mortgage by appointment under a power, and an appointment and conveyance to trustees upon trusts expressly declared. In the case of a mere ordinary mortgage, in which the reservation of the equity of redemption differs from the original limitations of the estate, the Court has no guide for determining between the constructive trust which arises from the terms in which the equity of redemption is reserved, and the trust which would otherwise result; but where there is a trust expressly declared, it is far otherwise. The Court cannot reach back to the original limitations without countervailing the trust which is expressly declared. Again, where there is an appointment by a person having an absolute power, he is the entire owner or master of the property, and no liability can attach upon him in whatever mode he may think proper to reserve the equity of redemption:

but the case is very different where there is such an appointment coupled with a conveyance by the trustees who hold upon trusts subject to the power. Such trustees cannot be justified in conveying, unless there be an intention to alter the limitation (*per* Turner, L. J., in *Heather* v. *O'Neil*, 2 D. & J. 415).

In *Fitzgerald* v. *Fauconberge* (Fitzg. 207), A., being seised in fee in 1712, settled his estate to the use of himself for life, with remainders over, reserving to himself a power of revocation by any writing attested by three witnesses. In 1715, A., by lease and release, attested by two witnessess, reciting that he was indebted to the persons named in the schedule, conveyed to trustees and their heirs on trust to raise out of the rents and profits, or by sale or mortgage, sufficient to pay his scheduled debts; and after payment thereof to pay the overplus (if any), and reconvey such part of the premises as should remain unsold to A., or such other person and for such uses as he by deed, attested by two witnesses, should direct. It was contended that the deed of 1715, being made for a particular purpose, would be a revocation *pro tanto* only, and that the residue of the estate continued subject to the old trusts; but the Lord Chancellor, the Master of the Rolls, and the Lord Chief Baron were all of opinion that the deed of 1715 operated as a total revocation of the deed of 1712; (and see *Martin* v. *Mitchell*, 2 J. & W. 413; Fisher on Mortgages, 4th ed. 698 *et seq.;* Sug. Pow. 276).

22. A power cannot be validly executed, except by such instrument or instruments as shall have been specified by the author of the power.

By will when a deed is required.

If a power is to be executed by deed it cannot be validly exercised by will (*Lord Darlington* v. *Pulteney*, Cowp. 260; *Lady Cavan* v *Doe*, 6 Bro. P. C. 175). In *Bushell* v. *Bushell* (1 S. & L. 90), there was a joint power of appointment by deed given to husband and wife: the husband made his will, and after his death his wife endorsed thereon her approbation of the disposition of the property thereby made. This was held bad, nor would it have been better if the wife had ratified it

at the time of the execution, it being revocable by the husband during his life.

Characteristics of a deed.

A deed is an instrument sealed and delivered (Co. Litt. 171 b; Shep. Touchstone, Chap. IV. p. 50); and in most cases signature also is required (2 Stephen's Comm., 8th ed., 491). Mr. Chance (Pow. pl. 875) suggests that a power to appoint by writing does not necessitate the signature of the writing (*sed qu.*).

By deed when a will is required.

A power to be executed by will cannot be validly exercised by any instrument to take effect in the lifetime of the donee of the power (*Reid* v. *Shergold*, 10 Ves. 370).

Testamentary intention.

If, however, the instrument purporting to execute the power shows really a testamentary intention, it is not to be considered as a deed merely because it bears a seal, or is in other respects in the form of a deed; but if it is in substance a deed, if it shows an intention that it should operate as an act *inter vivos*, an act by which the party who executed it would lose the power of dominion over the property which he previously possessed, it must be regarded as a deed (*Marjoribanks* v. *Hovenden*, Dru. 11; and cf. *Forteseue* v. *Hennah*, 19 Ves. 67.)

Not to be implied from limitations.

But an instrument, in form a deed, will not be held to be testamentary from the circumstance that the limitations, owing to the nature and state of the property, cannot take effect until after the death of the appointor (*Hougham* v. *Sandys*, 2 Sim. 95, 137; *Tompson* v. *Browne*, 3 M. & K. 32).

A will is "an instrument in writing."

A power to appoint "by will or otherwise," or "by deed or otherwise," of course includes all methods by which the property subject to the power can legally pass. And a power to be executed by an "instrument in writing" can be executed by will; for a will is an instrument in writing. But the formalities required must be observed; for the power is not in terms a power to appoint by will; and whether it has been duly exercised by will or not, depends on the inquiry whether the will answers the description of the required instrument contained in the power. If one of the requisite solemnities be wanting, the will does not do so, and the Statute of Wills does not make it answer. The statute applies to powers requiring specifically a *will*, with other solemnities in addition to the solemnities

rendered necessary by the statute, and in such case declares that a will without such additional solemnities shall be sufficient; but it does not touch the case of a power requiring an *instrument in writing*, signed, sealed, and delivered. The only principle on which a will was ever held to be a good execution of such a power was that it answered the description. If it does not, it is not an execution, and the statute can afford no help (*Taylor* v. *Meads*, 4 D. J. & S. 597; 34 L. J. Ch. 203; 13 W. R. 394; *West* v. *Ray*, Kay, 385; *Orange* v. *Pickford*, 4 Dr. 363; 27 L. J. Ch. 808, where the will was prior to the Wills Act; *Smith* v. *Adkins*, 14 Eq. 402). *Buckell* v. *Blenkhorn* (5 Ha. 131) is overruled on this point.

Power exerciseable by deed, instrument, or will.

In *Brodrick* v. *Brown* (1 K. & J. 328), V.-C. Wood said that a power to dispose of personalty standing in the name of trustees, "by deed or deeds, instrument or instruments, or by will," would be well executed by a written order directed to the trustees. If the donee were himself sole trustee, a cheque on the bankers where the fund was lying would be a good appointment, if he had no money of his own there. So, too, would a letter from him, referring to the power or the property, and accompanying a gift of money, which it stated to be in pursuance of the power, or out of the property.

Statute of Frauds must be satisfied where property is realty.

If the property subject to the power is real estate, any uses or trusts affecting it must be declared in such a manner as to satisfy the Statute of Frauds. Thus, in *Hawke* v. *Hawke* (26 W. R. 93), real estate stood limited to such uses as A. and his wife should by deed or writing jointly appoint. A. wrote out with his wife's assent an appointment by way of settlement, and sent a copy to his solicitors as instructions, and then died before the deed was executed. This was held to be insufficient to satisfy the Statute of Frauds, as there was no writing signed by the wife (cf. *Dye* v. *Dye*, 13 Q. B. D. 147).

Secus, as to personalty.

If the property is personal, no writing is necessary unless the power requires one. A parol trust can be declared of personal estate; and the execution of the power over personalty is merely the declaration of a trust. Thus, in *Proby* v. *Landor* (28 B. 504; 30 L. J. Ch. 593), an unsigned memorandum in

the testator's handwriting was held to be sufficient. And in *Bailey* v. *Hughes* (19 B. 169), the M. R. said that it was not necessary to exercise the power by any formal instrument, and the mere fact of saying how the property was to be divided would have been sufficient.

Exercise of power by will revocable without express power.

If a power exercisable by "writing" is executed by a will, such will is of course revocable, although no express power of revocation is reserved (*Lisle* v. *Lisle*, 1 Bro. C. C. 533).

By several assurances.

A power, to be executed by one instrument, may, it seems, be executed by several assurances, which, although insufficient if taken singly, will operate together as one complete act; but in order to enable the Court to read the whole series as one assurance, such must be the intention of the parties on the perfection of the *first* assurance (Sug. Pow. 227; and see *Lord Braybrooke* v. *Attorney-General*, 9 H. L. C. 150). A power to revoke uses by deed, and by such deed to declare new uses, may be exercised by one deed (*Fitzwilliam's case*, 6 Co. Rep. 33).

Practical effect of distinction between common law and statutory use powers, *quà* their execution.

23. The distinction between common law powers and powers operating under the Statute of Uses is important with reference to their execution. For the same words, purporting to be an execution of powers of different natures, may give the legal estate to different persons. Thus, if lands be limited to such uses as A. shall appoint, and A. appoints to B. and his heirs to the use of C. and his heirs, B., and not C., will take the legal estate (*Doe* d. *Worger* v. *Haddon*, 4 M. & R. 118). But if A.'s power had been a common law one—*e.g.*, if there had been a devise by a testator that A. should sell his lands, the same words of appointment would have vested the legal estate in C., for it seems clear that powers under wills operate in exactly the same manner as powers under other instruments operating by way of use (Sug. Pow. 196).

24. No technical words, however, are necessary to render the execution of a power effectual, if the intention be clear: and the instrument creating the power need not be recited (*Maundrell* v. *Maundrell*, 10 Ves. 246, 258; *Clere's case*, 6 Co. Rep. 17). "If the intention to execute the power be clear, it makes no difference that the donee does not refer to, or take the slightest

notice of it: quia non refert an quis intentionem suam declaret verbis an rebus ipsis vel factis" (L. R. 2 Sc. & D. 233).

25. The rule for deciding whether an intention to execute is shown or not, is thus stated by V.-C. Wood. It applies to cases where the donee of the power has no interest (see *post*, p. 266), and also to the execution of general powers by deed, and by will before the Wills Act, and of limited powers, whether by deed or by will, both before and since the Act.

Requisites to show intention to execute a general power by deed or by will before the Act; or a limited power.

The instrument must refer either to the power, or to the property subject to the power; or it must affect to deal with some property in general terms, not defining it, under such circumstances that it cannot have effect except upon the property comprised in the power (*Brodrick* v. *Brown*, 1 K. & J. 332; *Hales* v. *Margerum*, 3 Ves. 299; *Bennett* v. *Aburrow*, 8 Ves. 609; *Hughes* v. *Turner*, 3 M. & K. 666, 696; *Andrews* v. *Emmot*, 2 Bro. C. C. 297; *Re Williams*, 42 Ch. D. 93; Sug. Pow. 201, 289).

Thus, in *Roake* v. *Denn* (4 Bli. N. R. 1; 1 Dow. & C. 437), testatrix was tenant in fee of an undivided moiety of an estate in Surrey, and tenant for life of the other moiety, with a power to appoint the latter moiety in fee. By her will she devised all her freeholds in Surrey; and it was held to be no execution of the power, since she made no reference either to the power or to the subject thereof, and there was her own undivided moiety for the will to operate on; (and see *Re Walsh's Trusts*, 1 L. R. Ir. 320; *Harvey* v. *Harvey*, 32 L. T. 141; 23 W. R. 478; *Re Mills*, 34 Ch. D. 186).

The rule above stated is, of course, subject to the rules before stated relative to the execution of powers. The powers in the following cases either did not require any particular form of instrument, or complied with such requirements.

In *Fortescue* v. *Gregor* (5 Ves. 553), A. had a power of appointment in favour of three children over a fund in Court. A petition was presented by one of the children reciting that A. was desirous that the fund in Court should be equally divided among the three children, and a third of the fund was accordingly transferred to the petitioner. A. then died without making any further appointment; and it was held that the recital in the petition was sufficient evidence of intention to appoint the whole fund in equal shares, no special form of appointment being prescribed. It does not appear from the report whether A. was served with the petition, or whether all the children took in default of appointment; (and see *Lee* v. *Head*, 1 K. & J. 620; *Foster* v. *Cautley*, 6 D. M. & G. 55). Recital in petition and payment out of part of fund.

In *Carter* v. *Carter* (Mos. 365), a statement in an answer in Chancery that a defendant had appointed, and did intend to appoint in due form, was held sufficient. Answer.

In *Cuninghame* v. *Anstruther* (L. R. 2 Sc. & D. 223), both parents in one case, and the survivor in the other, took upon themselves and himself respectively an obligation on the respective marriages of their two daughters to pay a certain sum. This sum was expressed to be accepted by the daughters "in satisfaction (amongst other things) of the share or division thereby allotted to her of her said father and mother's property settled by their marriage contract." The said marriage contract comprised funds, settled so as to belong ultimately to the children of the marriage, as the parents or the survivor of them should appoint, and in default to the children equally. It was held that there had been a sufficient reference to the power to show that the appointor meant to execute it by the settlement which contained such reference; (and see *Wilson* v. *Piggott*, 2 Ves. 351; *Poulson* v. *Wellington*, 2 P. & W. 533; *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358; *Re Farnell*, 33 Ch. D. 599). Recital in a settlement.

A bill filed against executors to compel a transfer of a fund by a person to whom such fund had been left for life, with power to dispose of it by will or otherwise, has been held sufficient (*Irwin* v. *Farrer*, 19 Ves. 86). So, too, the presentation Bill.

of a petition for payment out of Court of the fund (*Holloway* v. *Clarkson*, 2 Ha. 521; *Re David*, John. 500). And payment out has been directed without the execution of a formal appointment (*Cambridge* v. *Rouse*, 25 B. 574).

Change of investment, and power of attorney insufficient.

Where A. had a life interest in stock standing in the names of trustees, with a power of appointment over a moiety by will or otherwise, and she sold out the stock and reinvested it in her own name, she was held not to have thereby exercised her power (*Reith* v. *Seymour*, 4 Russ. 263). But in *Marler* v. *Tommas* (17 Eq. 8), shares in an unlimited company were standing in the name of the trustee of a settlement on trust for the separate use of the wife for life, and after her death for her general appointees by deed or will. The husband died, and the trustee transferred the shares to the wife, and she executed the deed of transfer. This was held sufficient. Such a power would not be executed by giving a power of attorney, executed in accordance with the terms of the power, to transfer the money, for that would be to turn an instrument of substitution into one of alienation (*Hughes* v. *Wells*, 9 Ha. 749).

But there must be evidence of an intention to execute: a mere reference to or mention of the fund is not sufficient, although accompanied by a confirmation of the instrument containing the power.

Intention to execute is necessary.

In *Re Bringloe* (26 L. T., N. S. 58), A., being entitled under B.'s will to personalty, settled 3,000*l.* thereout on C. On his own second marriage in 1823, he settled a further 2,500*l.* on his wife for life, with remainder to the children of the marriage; and in default of issue, for his own general testamentary appointees; and in default of appointment, for his next of kin. A., by his will in 1824, after reciting that he was entitled to personalty under B.'s will, and that he had settled 3,000*l.* thereof on C. and 2,500*l.* on his wife on her marriage, confirmed the said settlement, and as to all the residue of the moneys to which he was entitled under B.'s will, he gave them on certain trusts. The testator died without issue in 1829 and his wife in 1869. This residuary gift was held not to be an exercise of the power of appointment created by the settlement in 1823: the

2,500*l.* went as in default of appointment, to A.'s next of kin, who were to be ascertained at his wife's death in 1869.

Indicia of intention to execute.

26. The rule being that there must be a reference to the power, or to the property subject to the power, in order to show an intention to execute, the difficulty chiefly arises in ascertaining whether such intention has been displayed (see *Harvey* v. *Stracey*, 1 Drew. 73, 115).

There are various *indicia* which have been held to point to an intention to execute, or the reverse.

Reference to subject-matter.

Thus, if the donee refer to the subject-matter of the power in such a manner that, if it had been a gift of the testator's own property, it would be held to point to particular stock in his possession, it will be sufficient: but it will be otherwise, if the words would not amount to a specific or demonstrative gift.

In *Re David* (John. 495), a testatrix bequeathed "all the residue of my property to be found in the Three-and-a-Half per Cent. Reduced Bank Annuities (now reduced to Three-and-a-Quarter per Cent.) and all other property whatsoever and wheresoever." She had no stock of her own at the date of the will, or at any time after, but had a limited power of appointment over a sum of Reduced Bank Annuities. This was held a sufficient reference; (and see *Re Gratwick*, 1 Eq. 177).

In *Davies* v. *Davies* (7 W. R. 85), a tenant for life of settled real estate had power to charge the settled estate with 500*l.* for younger children. He purported to devise the settled estate by his will, charged with 500*l.* for his younger children. This was held a good execution.

On the other hand, in *Webb* v. *Honnor* (1 J. & W. 352), a testator, having a general power over a fund in consols, limited in default to his children, and having no other funded property, bequeathed "the whole of my personal estate consisting of the public funds, household furniture," &c. It was held that this did not operate as an appointment, and that the fact of the testator having no other funded property could not be regarded. And in *Re Mattingley's Trusts* (2 J. & H. 426), a testator, having power by will to appoint a fund in consols among his children, bequeathed all his personal estate upon trust to pay debts and

funeral expenses, a legacy of 19*l.* to his daughter A., and to his daughter B. all his household furniture; and "as to all my money in the funds and all the residue of my personal estate" upon further trusts for the benefit of B. It was held that, although at the date of his will, and of his death, he had no other funded property, this did not operate as an appointment.

Identity of amount of legacies and of fund insufficient.

But the circumstance of legacies being identical in amount with a fund subject to a power, and of the insufficiency of the donee's own property to answer the bequests given by the will, are not enough to raise more than a conjecture, and therefore not enough to form grounds of judicial determination (*Davies* v. *Thorns*, 3 De G. & Sm. 347; *Jones* v. *Tucker*, 2 Mer. 533; *Buxton* v. *Buxton*, 1 Ke. 753; *Lowe* v. *Pennington*, 10 L. J. Ch. 83). But in *Lownds* v. *Lownds* (1 Y. & J. 445), a testator, by his will, bequeathed sums amounting in the whole to exactly the sum over which he had a power of appointment, but made no reference to the power, and did not expressly refer to the subject-matter of the power. He had, practically, no other property than that over which the power extended. Alexander, C. B., took this point into account and held that the will operated as a good appointment; (and see *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; 31 L. J. Ch. 636).

Where legacies are given to objects of the power, and the fund is then appointed to a stranger, subject to the legacies, there is a sufficient appointment of the legacies (*Disney* v. *Crosse*, 2 Eq. 592). But a reference to a part of the subject of the power in a specific gift will not be enough to exercise the power over the rest of the property the subject thereof (*Hughes* v. *Turner*, 3 M. & K. 666). In *Elliott* v. *Elliott* (15 Sim. 321), a testatrix, having personal estate of her own, and a special power of appointment over two sums of government stock, by her will gave one-third of the two sums to objects of the power, and bequeathed all the residue of her personal estate, after payment of her debts, funeral and testamentary expenses, and the before-mentioned legacies, to two persons, objects of the power. This was held to be a good exercise; but in his judgment the V.-C. said: "I admit that, if it had been simply a gift of all the

residue of her personal estate and effects, it would not have been an exercise of the power; but as she has added the words 'after payment of the before-mentioned legacies,' and as the funds over which she had the power were alone made applicable to satisfy some of those legacies, I must of necessity hold that this residuary clause refers not only to her own personal estate, but to the funds over which she had the power"; (and cf. *Gainsford* v. *Dunn*, 17 Eq. 405). In *Re Comber* (14 W. R. 172), the testator began his will in the following terms: "Having the disposal of 2,500*l.* bank annuities, I dispose thereof as follows," and then gave 200*l.* "part thereof," and 100*l.* "other part thereof," and 100*l.* "other part of the aforesaid stocks;" and then "as to all the rest residue and remainder of my personal estate whatsoever and wheresoever," he gave the same to A. It was held that the residuary bequest operated as an execution of the power over the balance of the fund; (and see *Innes* v. *Sayer*, 3 M. & G. 606, 612 *et seq.*) In *Reid* v. *Reid* (25 B. 469), a testatrix, having considerable property of her own, including some ground-rents but no other freeholds, and having a power of appointment under her husband's will over other property, including ground-rents and freeholds, made her will and in pursuance of her power disposed of her own and her husband's property. She gave to A. certain property of her own "and 10*l.* a year out of my ground-rents;" to B. a house over which she had a power only, and "likewise the whole of the residue of my property of every description (excepting my freehold property as disposed by the codicil to my will)." It was held that as she had expressly excepted, as her own, property over which she had a power only, her intention was clear that the will should operate as an execution of the power as to the residue.

Appointment of Blackacre does not execute power of appointing a charge thereon.

The execution of a power of appointing real estate will not generally show an intention to exercise a power of appointing a sum secured by a term on the same estate.

In *Farmer* v. *Bradford* (3 Russ. 354), an estate subject to a term of years was limited to such uses as A. should appoint, and in default to him in fee. The trusts of the term were (in the events that happened) to raise 1,000*l.* for A.'s appointees,

and in default of appointment for B. A. by his will before the Wills Act devised the estate and gave all the residue of his property to C.: the will took no notice of the term. B. was held entitled to have the 1,000*l.* raised for his own benefit.

The Wills Act has made no difference in this respect. In *Clifford* v. *Clifford* (9 Ha. 675), A. had power to appoint lands in fee: he had also power to appoint a sum secured by a term in the same lands. A. appointed the lands to B. for life with remainders over, and made him residuary legatee absolutely. The sum secured by the term was held to pass under the residuary gift to B. absolutely, and not under the express appointment of the fee.

Reference to one estate, when testator has power over two.

A reference to part of the subject or to some of many subjects of a power, will not be sufficient to make a will operate as an execution of the whole power where there is no other indication of an intention to execute it (*Hughes* v. *Turner*, 3 M. & K. 666).

In *Lewis* v. *Llewellyn* (T. & R. 104), a testator had freehold estates of his own but no copyholds: he had also a power of appointment over both freeholds and copyholds. By his will he devised all his freehold and copyhold estates. The devise was held to execute the power over the copyholds, but not over the freeholds.

In *Napier* v. *Napier* (1 Sim. 28), testator by will in 1799 devised all his lands in nine several parishes, which he named. In five of these he had lands only in fee; in three of them, lands over which he had a power of appointment; and in the ninth, both lands in fee and lands over which he had a power. He made no reference to the power: and it was held that, whereas the lands in the three parishes over which he had only a power passed, because otherwise there were no lands in those parishes for the will to operate on, yet the lands in the ninth parish over which he had a power did not pass, because in that parish he had other lands to which the will might refer; (see *contra*, *Walker* v. *Mackie*, 4 Russ. 76, and the strictures of Lord Cottenham on that case in *Hughes* v. *Turner*, 3 M. & K. at p. 697).

On the other hand is *Re Wait*, *Workman* v. *Petgrave* (30

Ch. D. 617), a testator, having a special power to appoint two estates at B. and S., and a one-fourth share in the X. colliery, devised his estates at B. and S. and gave "all my share and interest in the X., Y., and Z. collieries." There was no reference to the power, but neither at the date of his will nor at the time of his death, had the testator any property of his own at B. or S. He had, however, as his own absolute property, a small share in the X. colliery and some shares in the Y. and Z. collieries. Pearson, J., held that the testator must have intended to exercise the power over the estates at B. and S., because otherwise there was nothing for the devises of those estates to operate upon; and that the testator, having so intended in those two cases, he must be presumed to have had a like intention with regard to the third gift, and that the will operated as a good execution of the power over the settled one-fourth share in the X. colliery.

The instrument of appointment need not in express terms mention the subject of the power, if it is clear that the testator intended to include that property in making his dispositions (*Hunloke* v. *Gell*, 1 R. & M. 515).

General words may suffice to execute limited power.

General words of appointment will be a sufficient reference to a limited power, if the donee have no other, and if the appointee be an object of the power. In *Re Teape* (16 Eq. 442), a testator, having power to appoint to his wife the income of a sum of stock, directed payment of his debts and gave all the residue of his property of which he might be possessed or be entitled to dispose to his wife absolutely. He had no other power. This was held a sufficient reference to the power, although the gift was absolute, and the power authorized a life interest only.

In *Bailey* v. *Lloyd* (5 Russ. 330), testator having a special power to appoint among his children, by his will "by virtue of all and every power and powers, authority and authorities, enabling" him thereto gave and devised all his estate real and personal. It was held that the reference to the power was sufficient evidence of his intention to exercise it, notwithstanding that the trusts of the will exceeded the power.

In *Banks* v. *Banks* (17 B. 352), testator, having power to

appoint real estate among his children, devised all the real estates of or to which he was seised or entitled or of which he had power to dispose or to appoint upon trust for his children and for other uses exceeding his authority. It was held, following the last-mentioned case, that this was a good exercise; (and see *Gainsford* v. *Dunn*, 17 Eq. 405; *Hope* v. *Hope*, 5 Giff. 13).

Blending of appointed fund with a residue out of which debts are to be paid.

The authorities are not altogether consistent on the question whether the fact that a fund subject to a limited power is appointed as part of a residue, subject to the payment of debts, &c., and then in trust for the objects of the power, is or is not sufficient indication of intention not to execute the power. In *Clogstoun* v. *Walcott* (13 Sim. 523), a testatrix, with a power of appointment among her children over stock, by her will in 1840, "by virtue of every power enabling her in that behalf," appointed all the property of or to which she was then or at the time of her death might be possessed or entitled or have power to dispose" to A. and B. on trust, after payment of her debts and funeral and testamentary expenses, to invest the residue for the benefit of her children. It was held that she could not have intended to exercise the limited power, because the only appointment contained in the will was of a residue after payment of debts and funeral expenses, to the payment of which the fund in question could not be subjected; and there were besides directions for investment which were inapplicable to the trust fund.

In *Re Cotton* (40 Ch. D. 41), North, J., came to a similar conclusion. In that case, testatrix had the usual power of appointing among children property settled on her marriage; and in default of appointment the children took vested interests at twenty-one or marriage. By her will the testatrix gave all her real and personal estate and all other the real estate over which she should at her death have a power of disposition to her trustees on trusts for conversion and sale, and after payment of debts to apply so much of the income as the trustees should think fit for the benefit of the testatrix's only child during minority, and on such child attaining twenty-one for her for

life, with remainder to her children. The judge appears to have been influenced by the inappropriate nature of the trusts declared; (and see *Re Porter*, *Porter* v. *De Quetteville*, 45 Ch. D. 179).

On the other hand, in *Ferrier* v. *Jay* (10 Eq. 550), the facts were similar to those in *Clogstoun* v. *Walcott;* and V.-C. Malins held that the limited power was well executed, saying, that by the rule *reddendo singula singulis*, it might well be supposed that the testatrix meant her debts to come out of that property which was her own, and the rest to pass to those who were the objects of the special power.

In *Coux* v. *Foster* (1 J. & H. 30), V.-C. Wood came to a similar conclusion; but *Clogstoun* v. *Walcott* was not cited.

In *Re Teape* (16 Eq. 442), L. C. Selborne, sitting for the Master of the Rolls, followed *Ferrier* v. *Jay*.

And in *Thornton* v. *Thornton* (20 Eq. 599), Malins, V.-C., carried the doctrine of *reddendo singula singulis* a step further, and read a gift of all property of which the testator had a disposing power to his wife for life, with remainder to her children, as an execution (i.) of a power of appointment among children of property in which his wife had a prior life interest; and (ii.) of a power to appoint a life interest to his wife over a fund held in trust for his children; (see, too, *Elliott* v. *Elliott*, 15 Sim. 321; *Pidgely* v. *Pidgely*, 1 Coll. 256; *Re Harris*, 20 W. R. 742).

In *Re Swinburne* (27 Ch. D. 696), testatrix, having power to appoint among a definite class, devised, appointed, and bequeathed all the real and personal estate of which she might be seised or possessed at the time of her death, or over which she might have any testamentary power, to trustees upon trust to sell and convert, and to hold the proceeds, after payment of costs, debts, funeral expenses, and certain legacies, as to two-fourths for persons who were objects of the power, and as to the other two-fourths, for persons not objects of the power. Pearson, J., held that as to one moiety of the settled property, the power was well exercised; (and see *Price* v. *Price*, 46 L. T. 228).

Reference to a "beneficial power of appointment."

Whether a general reference to a "*beneficial* power of appointment" is sufficient to execute a special power is doubtful. In *Ames* v. *Cadogan* (12 Ch. D. 868), a testator had power to appoint personal estate among children, and by his will gave all the real and personal estate of or to which he might be seised or entitled, or over which he might have "any beneficial power of disposition," to trustees upon trust for sale and conversion, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and also a mortgage debt on a certain estate, and as to the residue in trust for objects of the power. Fry, J., laid considerable stress on the use of the word *beneficial*, as evidencing an intention not to exercise the special power, and held that the will did not execute the power. On the other hand, in *Von Brockdorff* v. *Malcolm* (30 Ch. D. 172), the testator, having a special power, by his will gave all the real and personal estate and effects whatsoever and wheresoever, whether in possession, reversion, remainder, or expectancy, over which at the time of his death he should have "any beneficial disposing power," to trustees upon trust for sale, &c., and then for persons some of whom were, and some of whom were not, objects of the power. Pearson, J., held that the power was well exercised by the will so far as regarded the appointees who were objects of the power.

Wrong reference to power or its subject.

Even a wrong reference to the power or the nature of the property will not prevent the instrument from operating as a good execution if the intention to exercise the power is otherwise clear. Thus, in *Re Eardley-Wilmot* (29 B. 644), the testator, having a power under a settlement made in 1839 to appoint portions to younger children, by his will recited that he had such a power under a settlement made in 1819, and in pursuance thereof appointed. He had, in fact, no such power under the earlier settlement; but it was held that, notwithstanding the wrong reference, the will was a good exercise of his true power. In *Fletcher* v. *Fletcher* (7 L. R. Ir. 40), the testator, having a power only to appoint certain leasehold premises in *M. Street*, and having no other property in the street, gave "my estate and interest in the houses and premises

in *M. Street*, limited to me, my executors and administrators, on the death of" X. This was held to be a good execution.

Reference to all powers in general terms.

A reference to all powers in general terms has been held not to execute a special power of a peculiar nature, when the directions with reference to the appointed property were not consistent with the nature of the property subject to the power. In *Beamish* v. *Beamish* (4 I. R. Eq. 120), A. was partner in a firm, the partnership deed of which provided that it should be lawful for each partner to bequeath his share to any one legitimate male descendant of B.; and that if such descendant should at the death of the partner be of age, he should have power to elect whether he would become a partner or have the value of the share paid him by the other partners. If he was a minor, the executors of the deceased partner were to elect for him, and the minor was to have a further power of election within six months after attaining twenty-one. A. made his will, by which he in no way referred to the partnership, and thereby devised, bequeathed, and in pursuance of every power enabling him, appointed the residue of his property to his son, an object of the power, if, and not unless, he should attain twenty-one; if he should die under that age, then he devised, bequeathed, and appointed the same to persons not objects of the power. A. had no other power. The son was a minor at the date of A.'s death, and A.'s executors elected that the son should become a partner. The Court held that it was a question of intention, and not to be dealt with as an execution of a power. The power of nomination was not exercised; only the money value of the share was intended to pass, and therefore the executors could not elect.

Reference to power, when testator has more than one.

It has been held by the House of Lords that a will, which purported to be made in execution of all powers, in fact executed two only out of three which the testatrix possessed (*Saward* v. *Macdonnell*, 2 H. L. C. 88. But Lord St. Leonards doubts the correctness of this decision: see Sug. Prop. H. of L. 502, 508; Pow. 295).

But although a recital and formal execution of one power by a testator who has several is evidence of an intention to execute such one power only (*Attorney-General* v. *Vigor*, 8 Ves. 256),

there may be other *indicia* besides mere general words, which will show that the other powers were in fact intended to be executed. In *Trollope* v. *Linton* (1 S. & S. 477), by articles made previously to the marriage of A. and B. his wife, an infant, A. had power to appoint B.'s real and leasehold estates among the children of the marriage. By other articles of the same date, his own real estates were settled to the use of himself for life, with remainder (subject to a jointure for the wife) to the use of his first and other sons in tail: and in default of such issue to such uses as A. should appoint. There were several children. A., by his will, recited the articles for the settlement of his own estate and confirmed them, and recited the power of appointment contained in them, and proceeded to devise to his wife part of the property comprised in her articles; and then, in exercise of the recited power and of all other powers, appointed his own real estates and all other real estates over which he had a power of appointment to trustees on certain trusts. The will made no mention of the articles for the settlement of B.'s estate, but contained a direction that all persons claiming under his will should be bound by the doctrine of election to give effect to the dispositions thereof. The Vice-Chancellor held that the circumstance of the testator having recited his power of appointment over his own estate *in hæc verba*, and yet made a disposition inconsistent with that power, and the expression that all persons claiming under his will should be bound by election to give effect thereto, showed that he intended to execute the power reserved to him over his wife's estates; (and see Sug. Pow. 293, 295).

In *Maunsell* v. *Maunsell* (19 W. R. 1003), the testatrix, having a special power over two funds, recited the power over one of them, and appointed that fund. She then devised all her real estate upon trust for conversion and gave and bequeathed, "and also in exercise of all powers and authorities" vested in her appointed all her personal estate upon trust for persons some of whom only were objects of the power. It was held to be a good exercise of the power over both funds. In *Saunders* v. *Carden* (27 L. R. Ir. 43), A. by his will gave B. his wife a power of

appointment over a sum of Bank of Ireland Stock and 1,000*l.* secured by mortgage, among the children of her two brothers living at her decease (except such child as should inherit the F. estate). By a codicil A. recalled this exception. B. by her will, after reciting that she was possessed of Bank of Ireland Stock and other property, but without referring to the power, bequeathed all her said property to her executors upon trust, after payment of debts and funeral and testamentary expenses, for certain objects of the power, and stated that she expressly excluded her nephew who would be entitled to the F. estate. In a subsequent part of her will B. recited the power given her by A.'s will to dispose of the mortgage debt, but made no reference to the codicil which removed the exception of the son who should inherit the F. estate, and she appointed the debt equally between the children of her two brothers living at her death, excluding the excepted son. B. had no Bank of Ireland Stock either when she made her will or at her death. It was held that the will operated as a good appointment of the stock, and that the inaccurate reference to the terms of the power by omitting the change made by the codicil did not vitiate the appointment of the mortgage debt.

If distinction between property and power present to testator's mind.

If a testator show that he had the distinction between property and power clearly before his mind, a gift in general terms will not operate as an execution of such powers as are mentioned at the commencement of sect. 25. Thus, in *Wildbore* v. *Gregory* (12 Eq. 482), V.-C. Bacon said that a testator cannot be considered, by using the words "my property," to have intended to deal with property over which he had a limited power of appointment, when there was property of his own, to which the words, giving full effect to them according to the terms of the will (exclusively of the instrument which created the power), would apply.

But if there is a reference to the power, and the will purports to be made in pursuance of the power, it is not necessary to describe the property, but the expression "my personal estate" is sufficient. If a testator, possessing a power, say, "by virtue of a power I make my will," and then say, "I give all my

money," this would be a sufficient execution (*Harvey* v. *Stracey*, 1 Drew. 113; and see *Bailey* v. *Lloyd*, 5 Russ. 330; *Reid* v. *Reid*, 25 B. 469; *Maunsell* v. *Maunsell*, 19 W. R. 1003).

In *Davies* v. *Fisher* (5 B. 201), a widow made her will, and thereby, after reciting her husband's will making her residuary legatee and a codicil thereto by which the property was directed to go over if she did not dispose of it, and stating her intention to dispose of all her husband's property and her own, she appointed executors, gave pecuniary legacies and annuities, directed payment of her debts, and then as to all the residue of her personal estate disposed thereof. It was held that the recitals shewed her intention to include her husband's estate, over which she had a power only, in her own property, and that the will therefore operated as a good execution; (and see *Re Comber*, 14 W. R. 172; *Humphery* v. *Humphery*, 36 L. T. 91).

On the other hand, in *Cooke* v. *Cunliffe* (17 Q. B. 245), the testator, having a power to appoint the uses of a settled estate and of a term of 500 years, and also being possessed of an estate of his own in fee, gave "all the residue of my personal estate and all my real estate over which I have any disposing power." It was held that there was no sufficient reference to the power or to the property to render this an execution of the power.

In *Evans* v. *Evans* (23 B. 1), a feme coverte with a power of appointment among her children, by her will in 1848, which did not refer to the power or the property subject to it, purported to dispose of "the property and income I am now or may become possessed of." She then gave "her property" to her husband and children. She had property of her own to which the will might refer. It was held that she had not executed her power.

Between general and particular power.

If a testator show that he has the distinction between a general and a particular power clearly before his mind, words applicable to the general power will not execute the particular power.

In *Butler* v. *Gray* (5 Ch. 26), the testatrix by her will in 1845 expressed her intention to appoint among her children a fund, which by virtue of her father's will she had power to appoint

among them. She then proceeded to appoint a portion only to them; and, after directing payment of her debts and legacies, gave to one of her children "the residue of the personal estate which belonged to her, or which she had any *general* power to dispose of." It was held that, by this residuary bequest, the testatrix intended to deal only with what was her own property, and not with that over which she knew she had only a limited power of appointment.

The mere use of the word "appoint" has been held insufficient to show an intention to execute a limited power, at any rate, where the donee of a limited power had also a general power (*Re Richardson*, 17 L. R. Ir. 436).

What is a sufficient intention.

27. All that is requisite is an intention on the part of the donee that the fund shall pass to some one who is an object of the power. When that intent appears, and the only means which the person so intending possesses of giving effect to it is by an exercise of a power of which he is donee, then—though his mind is a mere blank as regards the power, though he has forgotten its existence (see *Re Porter*, 45 Ch. D. 179), or never knew he had it—the law will presume that he must have meant to make use of the only means within his reach of achieving his expressed purpose. This is subject to one exception, which is theoretical rather than practical. When what we find is not merely the absence of a positive intention to exercise the power, but the demonstrated presence of a positive intention not to exercise it, then it will be held not to have been exercised, even though the intention to pass the subject is expressed (*per* L. J. Christian in *Minchin* v. *Minchin*, 5 I. R. Eq. 273; and see *Griffith-Boscawen* v. *Scott*, 26 Ch. D. 358; *Proby* v. *Landor*, 28 B. 504).

The principle is, that the donee of the power having shown an intention that the property subject to the power shall pass, the mere expression that it is to pass in a particular manner shall not control the general intention that it shall pass at all events.

In *Ward* v. *Hartpole* (3 Bli. 470), tenant for life had power to grant leases for lives, renewable for ever, at the best rent

obtainable, but without fine; and another power to raise money for any purpose and charge it on the estate. He granted a certain lease for lives renewable for ever at a rent, and at the same time took 300*l.* from the lessee, for which he gave a separate receipt. It was held that the receipt of 300*l.* was good under the second power, whether or not it was originally taken as a fine.

But there must be a clear intention that the property should pass—*i. e.*, an intention to do an act, which can only be done by the execution of the power. When the intention to do such act is clear, and it cannot be done except by executing the power (by means of any estate which the party possesses or otherwise), the law will consider such an act as an execution of the power (*Re Morgan*, 7 Ir. Ch. R. 18).

In *Robinson* v. *Sykes* (23 Bea. 40), the testator, having under his marriage settlement a non-exclusive power to appoint certain funds among his children, made a codicil, and thereby, after reciting that the funds had been invested in an estate, and that he had contributed 300*l.* to make up the purchase-money, he appointed that the sum of 300*l.*, or such other sum as he was empowered to appoint, should be raised by the trustees of the settlement and paid to one of the objects of the power. The M. R. held that the intention was either to appoint the sum contributed by him—which in fact was not 300*l.*, but a mere trifle—or to appoint the whole trust fund, in which case it was bad as being exclusive.

In *Brookman* v. *Hales* (2 V. & B. 45), a widow was tenant for life of (amongst other property) renewable leaseholds, with a general power of appointment by deed or will, in default of which they were to go to her husband's brother. During her life she several times, in her own name and at her own expense, obtained renewals of the lease; and the question was raised after her death whether these renewals operated as an appointment in her own favour. It was held that they did not so operate, but enured to the benefit of the remainderman.

Clear intention requisite.

28. And there must be in all cases a clear intention to deal legally with the fund. The jurisdiction of the Court is to

supply defects occasioned by mistake or inadvertence, not to supply omissions intentionally made.

In *Garth* v. *Townsend* (7 Eq. 220), the donee of a power of appointment among her children by deed or will or writing purporting to be or in the nature of her will, left a signed but unattested memorandum in an envelope addressed to her son. "For my son and daughters. Not having made a will, I leave this memorandum, and hope my children will be guided by it, though it is not a legal document. The (funds) I wish divided as follows (amongst her children). This paper contains my last wishes and blessings upon my dear children, and thanks for their love to me." This memorandum was held to show no intention to execute the power, and consequently the Court could not remedy any defects in execution so as to give it validity as an appointment.

In *Pennefather* v. *Pennefather* (7 I. R. Eq. 300), lands were vested in trustees for a term of years, on trust to raise 4,000*l.* for the children of the marriage, payable as A., and in default of appointment by him, as his wife should appoint by deed or will, and in default of appointment by either, among the children equally. A., by will, directed all his lands, including those comprised in the term, to be sold, and out of the produce gave portions to his five sons, and 1,000*l.* each to three of his daughters. By codicil he gave 1,000*l.* each to his two remaining daughters, and added:—"I hereby direct that no part of the produce of my lands shall be paid to any of my sons until the said sums of 1,000*l.* each shall have been paid to each of my said five daughters, or 5,000*l.* among the survivors of them, *over and above and in addition to the equal distributive share of the* 4,000*l. mentioned in my marriage settlement, which each of them are entitled to.*" The Court of Appeal, reversing the judgment of the Vice-Chancellor, held the power not executed; the words were not unmeaning, for they excluded any question of satisfaction or election.

The Lord Chancellor said (p. 310):—"It is important to observe that in all the cases in which intention to execute the

power has been presumed in the absence of specific reference to it, the intention on the part of the donee to pass the property or do an act with reference to it, operative under the instrument which he signs, has been clearly indicated. He must intend himself to make the gift which is to be validated by implication.

Parallel case of legacy.

In *Adams* v. *Adams* (1 Ha. 540), the Vice-Chancellor says:— "Where a testator in one part of his will has recited that he has given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration that he supposes the party who is referred to has an interest independent of the will, such a recital is no evidence of an intention to give by the will, and cannot be treated as a gift by implication" (and see *Nugent* v. *Nugent*, 8 I. R. Eq. 78). The distinction between the two cases is obvious. In the former, the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as is observed by Mr. Jarman (vol. i. p. 525, 4th ed.), "such recitals do not in general amount to a devise; for as the testator evidently conceives that the person referred to possesses a title independent of his own, he does not intend to make an actual disposition in favour of such person" (and cf. *Hall* v. *Lietch*, 9 Eq. 376).

29. From the principles stated in the last section, the Lord Chancellor of Ireland (Lord O'Hagan) deduces a rule as to powers, which may be thus stated:—

Distinction between recitals showing that appointor thought he had appointed; and that he thought appointee was entitled.

If the donee of a limited power of appointment erroneously recites that he has thereby appointed, this recital is evidence of an intention to execute the power.

If, however, he recites that an object of the power is entitled to the property subject to the power, this is evidence that he supposes that the

person referred to possesses an independent title, and negatives any intention to exercise the power.

It has accordingly been held that where a power of appointment was given to A. and B. jointly and to the survivor of them, and A. purported to exercise the power in favour of C., an object, and died before B., a recital in C.'s marriage settlement, to which B. was a party, that C. was entitled to part of the fund under A.'s appointment, did not amount to an appointment by B., although he was then sole donee of the power, and the settlement was an apt instrument for the appointment, and although the husband of C. made a settlement in consideration of the supposed validity of the appointment (*Minchin* v. *Minchin*, 5 I. R. Eq. 178, 258; but see *post*, s. 32).

In *Re Walsh* (1 L. R. Ir. 320), A. had a testamentary power of appointing policies among his five children; and, subject thereto, B. and C. and the survivor of them had a power of appointing to the same children by deed. On the marriage of one of the children, A. by deed purported to appoint one of the policies to the intended husband; and by his will he recited the marriage of this child, and that she had been already provided for. This was held to be insufficient.

In *L'Estrange* v. *L'Estrange* (25 L. R. Ir. 399), the T. estate was devised to A. for life, and after A.'s death to his issue as A. should appoint by deed or will, and in default of appointment to such issue equally. A. by his will, after charging an annuity upon the T. estate in favour of his wife (which it was held he had no power to do), proceeded: "As my eldest son Daniel will inherit my estate of T. under his grandfather's will, I consider him provided for," and made no further reference to the T. estate. It was held that this did not amount to an exercise of the power in favour of Daniel; and the distinction was pointed out between recitals in deeds for value and in wills.

If, however, the donee of the power has himself done some act which in itself would not be sufficient to operate as an execution of the power, and then by an instrument capable of executing the power, recites or states that the donee is thereunder entitled,

If the invalid appointment be made by the donee himself.

this will amount to an execution of the power. In *Lees* v. *Lees* (5 I. R. Eq. 549), funds were settled by marriage articles on trust for A. during the joint lives of himself and B., with an ultimate trust to the use and behoof of the issue of the intended marriage if more than one, as A. should appoint. A. transferred part of the funds into the names of himself, B., and a child; and by his will, after referring to "all sums in his lifetime advanced to or secured for" his children, directed conversion and division of his whole property on B.'s death, the sums advanced to be brought into hotchpot; he then gave a list of sums so advanced, and in it included the part of the trust fund transferred into the names of himself, B., and their child: this was held sufficient (cf. *Morgan* v. *Gronow*, 16 Eq. 1).

Powers are not executed contrary to express intention.

30. As a necessary consequence of the principles above stated, a power will not be held to be executed, contrary to the expressed intention of the donee, although it be clear that he acted under a misapprehension in making use of such expression (see *ante*, s. 27). In *Carver* v. *Richards* (27 B. 496), the Master of the Rolls, after saying that it is the intention which governs in these cases, proceeds thus: "I admit that this leads to very nice distinctions, and that it may very often be extremely difficult to distinguish or define the limits between an intention not to execute a power and the case of no knowledge of the existence of the power, in which case, strictly speaking, there is no intention to execute it, whilst in the former there is an intention not to execute it. The facts from which such intention and absence of intention are to be inferred may very often run near to each other, and possibly lead in some cases to very nice and perhaps technical distinctions; but the principle appears to me to be clearly established by the cases."

In *Langslow* v. *Langslow* (21 B. 552), funds were vested in trustees in trust after the death of A. and B. for the children, grandchildren, or other issue of A. and B. as they or the survivor should appoint, and in default, for all the children equally; the hotchpot clause was applicable as between children only. An appointment by deed was made to one son, and another son died, leaving a son. A. survived B., and by will, which recited

that the son would be obliged under the hotchpot clause to bring in the share appointed to him, proceeded: "and then as I make no further appointment, the whole settled fund will be equally divided between him and my little grandson." This was held to be no appointment. It might be said that if he had understood what the effect would be, he would have made an appointment; but this would admit that there was no appointment.

What is sufficient to make an execution of one power operate as the execution of another.

31. We have seen (s. 27) that if the intention to pass the property is clear, the power by which alone it can pass will be held to have been executed, although another is referred to, but the rule is that—

> In order to enable the Court to say that one power has been executed when another purports to have been, there must be sufficient words to amount to an execution of the first power.

If, therefore, the words be referable to a non-existing power and no other, such an appointment would fail altogether; but if there are general words of appointment sufficient to execute the valid power, in addition to the words executing the invalid power, as a general rule the intention to pass the property will prevail, and the mere mistaken supposition of the appointor that the property would pass by virtue of a power other than that by which he expresses his intention to pass it, will not be held to exclude the possibility of its passing under the general words, *ut res pereat*.

In *Bruce* v. *Bruce* (11 Eq. 371), A. had power to appoint real estate among the children of the marriage, to whom it was limited in default of appointment. By an invalid assurance A. purported to destroy this power and confer on herself a general power. By her will, without reference to her special power, but in exercise of her supposed general power and "every other power enabling her in that behalf," she appointed the lands to her children and others. This was held a good execution of the

special power so far as it was made in favour of the objects thereof. The Master of the Rolls said that he considered it to be a rule applicable to the execution of powers, that a power will not be deemed to be executed contrary to the intention of the donee of the power, when the donee supposes that a different power from that assumed to be executed is vested in him. But there is no doubt that the Court will, in order to give effect to the intention of the donee of the power for that purpose, aid the execution of a power not specially referred to, though such power was not present to the mind of the donee at the time of the execution.

In *Re Eardley-Wilmot* (29 B. 644), the testator, having a power under a settlement of 1839 to appoint portions to younger children, by his will recited that he had such a power under a settlement made in 1819, which in fact contained no such power, and in pursuance of the recited power appointed portions. It was held that this operated as a good exercise of the power in the later settlement, notwithstanding the wrong reference; (and see *Re Boyd*, 63 L. T. 92; *Re Swinburne*, 27 Ch. D. 696; *Saunders* v. *Carden*, 27 L. R. Ir. 43).

If, however, the execution purported to be of an entirely different power, *e. g.*, if it were joint instead of single, and applied to a term of years created for a different purpose, or operated on a fund of different quantity, which had a different destination in default of appointment, it would be otherwise (*Hamilton* v. *Royse*, 2 Sch. & L. 315, 331). And if a man has both an express and an implied power, and he mentions and purports to execute the former, this will not be an execution of the latter (*A.-G.* v. *Vigor*, 8 Ves. 256). But an accrued share may pass under general words of appointment, if wide enough (*Re Denton, Bannerman* v. *Toosey*, 63 L. T. 105). And although an appointment may be effectual as a disposition of property while still in reversion, it may well be that it is construed as taking effect only when it falls into possession, so as to prevent the application of the doctrine of *Re Lord Chesterfield* (24 Ch. D. 643); see *Re Flower*, 63 L. T. 201.

32. There is a distinction between powers executed in favour of volunteers and those executed in favour of purchasers; though it may be doubted whether, on questions of construction, the Court has any bias. The rule is that— Distinction between executions in favour of volunteers and of purchasers.

> The onus of proving the intention to execute a power voluntarily is on the volunteer; but if the person alleging the execution is a purchaser, the presumption is in his favour.

In *Blake* v. *Marnell* (2 B. & B. 38, n.; *S. C.*, 4 Dow, 248, *sub nom.*, *Marnell* v. *Blake*), Lord Redesdale says: "Where a person voluntarily executes an instrument which may have effect under a power to charge property, he must demonstrate that he meant to execute the power: but where a person acts for valuable consideration, he is understood in equity to engage with the person whom he dealt with to make the instrument as effectual as he has power to make it; and whenever that is done, according to all the cases (upon which I see nothing to raise a doubt), it shall have effect so far as the person who is to execute it has power to give it effect. But where the nature of the instrument is not according to the power, but demonstrates an intent to execute it, it shall have the operation of charging in the form in which the power allows it to charge.

Thus, in *Wilson* v. *Piggott* (2 Ves. jun. 351), the donee of a power of appointment among children was a party to his daughter's marriage settlement, which recited that she was entitled to 1000*l.*, part of the fund subject to the power, and to another sum, "both of which would belong to her husband," and the husband at the same time made a provision for the wife. This was held to be an appointment to her, the husband being a purchaser. Lord Alvanley said: "In this settlement he declares her entitled to this sum, to which she could only be entitled by his appointment, and the husband makes a settlement in consideration of it. He could have compelled the father to execute a regular appointment; it is a covenant by the father." But where the instrument containing the recital is an apt one for the execution of the power, there seems no reason why such

recital should not itself operate as an appointment without more (see Sug. Pow. 202).

However, in *Minchin* v. *Minchin* (5 I. R. Eq. 178, 258), A. and B. and the survivor of them had a power of appointing 1,000*l.* among their children; B. had also power to appoint 4,000*l.* among her children. B., by her will in 1842, recited both powers, and appointed 500*l.* to each of her eight daughters out of the two sums of 4,000*l.* and 1,000*l.* After B.'s death a settlement was made on the marriage of one of her daughters, to which A. was a party. It recited the instruments creating the two powers, accurately distinguishing them, and that B. exercised both those powers by her will, and that C. was thereunder entitled to 500*l.*, that A. had agreed to settle a further sum in addition to and to be settled with the 500*l.*, and C. thereby assigned the said 500*l.* to trustees. B.'s will was not a valid execution of the powers, and was set aside by the Court. The Lord Chancellor O'Hagan, affirming the Master of the Rolls, held that the recital in the settlement did not operate as an appointment by the father. The Lord Chancellor said that the purpose to convey the 500*l.* was the daughter's; the act of conveying it was exclusively hers. The father could not have intended to convey that over which he believed he had no control: he did not take any part in the act of conveying it. He was a party *diverso intuitu*, and there seemed to him no valid ground for imputing to the father a purpose which undoubtedly in fact was foreign to his mind, because of an act which was his daughter's only, and not his at all.

The L. J. Christian dissented (see his judgment, p. 269). He thought that all the statements in the settlement regarding the daughter's fortune, whether by way of recitals of facts or assertions of right, were to be imputed to the father, in the sense of his having participated in the making of them. He was an executing party to the deed; he was identified with the daughter, not only in the formal framework of it, in which they made but one party, but in sympathy, in purpose, and in interest. He, even more than she herself, was to be looked to for the truth and honour of the representations which were

made regarding her fortune to the man who was about to marry her. It is of course clear that there was ample consideration. He further thought that the settlement displayed two intentions. There was, first, the general and leading intent, which was one of substance and of merits, viz., that the daughter should have out of the two funds 500*l.* as part of her fortune and as part of the consideration for the jointure which was being settled on her; there was, secondly, a particular and special intent or supposition, which was one of mere form and conveyancing, viz., that the particular instrument through which she derived that right was the will of the mother, as an exercise of the power. But that was a mistake; the will had no such effect, and gave her no right at all. But the father possessed that very same power, an exercise of which was all that was needed for instantly effectuating the first and general and leading intent, and which exercise lay clearly within the scope and function of the settlement.

The Lord Justice's reasoning seems more consistent with principle and authority than the actual decision. It is true that the father expressed no intention to appoint; but the same was the case in *Wilson* v. *Piggott;* (and see *Lestrange* v. *Lestrange*, 25 L. R. Ir. 399). The only distinction between the two cases would appear to be that in *Wilson* v. *Piggott*, the father could not have supposed that his daughter had any title at all, unless by his appointment; in *Minchin* v. *Minchin*, the father thought his daughter had a complete title independently of him.

But there will be no presumption in favour of an intention to appoint, if the instrument be purely voluntary, as, *e.g.*, a will. In such a case the onus of proving the intention lies on the person claiming to be the appointee (*Pennefather* v. *Pennefather*, 7 I. R. Eq. 317). See the case stated *ante*, sect. 28.

33. A power may be well exercised notwithstanding a previous invalid execution; but if such invalidity is due to fraud, the validity of the

Fund insufficiently appointed may be re-appointed.

second execution depends on proof that such fraud no longer exists.

"Supposing a power had been defectively executed, and the parties afterwards execute it properly, there is no doubt but the law would look upon the first execution as null and void, and that it might therefore be exercised over again." (*Per* Lord Hardwicke in *Hervey* v. *Hervey*, 1 Atk. 567.)

In *Edwards* v. *Slater* (Hardres, 410), lands were settled to the use of A. for life, with a proviso that if he should make a jointure to his wife, and grant a lease for thirty-one years to commence after his death for raising 3,000*l.* for portions, the lands should be held to those uses; and, after divers remainders over in tail, the fee was limited to A. He afterwards made a jointure pursuant to the power, and then bargained and sold the lands in fee upon trust to raise portions. The bargainees subsequently reconveyed to A. in fee by feoffment; and he then made a lease for thirty-one years for raising 3,000*l.* for portions. It was held that the lease was a good execution of the power, although the attempt to execute it by the bargain and sale was bad.

In *Tippet* v. *Eyres* (5 Mod. 457; 2 Vent. 113), there was a submission to the award of A. to be made before the 4th of April, or else to the umpirage of such an one as A. should choose, to be made on or before the 16th of April. A. made no award, but on the 1st of April chose and nominated B. to be umpire; and on B.'s refusal he nominated C., who accepted and awarded. In an action on the award it was held that A.'s authority was not exhausted by the mere nomination of B., independently of his acceptance, and that his subsequent appointment of C. was good. *Per* Ventris, J.: "An authority once well executed cannot be transacted anew; but where it is not well executed it may be acted again. The naming is only a commencement of the execution of the authority." Rokeby and Powell, JJ., agreed; but Pollexfen, C. J., differed.

In *Hole* v. *Escott* (4 M. & C. 187), husband and wife had a joint power of appointment among children, with a power in

default to the survivor. The husband became bankrupt, and afterwards joined with his wife in appointing. After his death a bill was filed by a person claiming under the bankruptcy, on the ground that the joint appointment was bad. The surviving wife then made a separate appointment in favour of the objects of the joint appointment. The joint appointment, being made after the bankruptcy, was held to be void; but the sole appointment of the widow was upheld.

In *Ward* v. *Tyrrell* (25 B. 563), the donee of a power of appointment among a class appointed exclusively to some of the class, and a bill was filed to set aside the appointment: the appointor then appointed in a different manner, but declared that such second appointment should be good only in case the first was set aside. The second was held good.

Fund fraudulently appointed.

The rule is the same, if the invalidity is caused by the execution being a fraud on the power, subject to this qualification:— that the onus of showing that the second appointment is untainted by the fraud that vitiated the first is on the appointees who claim under it. Theoretically, therefore, if there were first a fraudulent appointment of part of a fund, and then a general appointment, before any steps had been taken to set aside the former appointment, with words sufficient to carry the fraudulently appointed fund, the latter may operate as an effectual appointment. But in the case of fraudulent appointments, whether actually set aside by the Court or not, if the second appointment is to the same person as the first, the difficulty of showing that the second appointment is free from the fraud which vitiated the first is so great as to be almost insuperable. And, "where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee to the same appointee cannot be sustained otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first." And "the burden of proof requisite to support a second appointment in such a case rests on the appointee." Per Giffard, L. J., in *Topham* v. *Duke of Portland*

(5 Ch. 40, 61, 62). In *Hutchins* v. *Hutchins* (10 I. R. Eq. 453), this principle was held to be of universal application; Chatterton, V.-C., saying that the principle above stated by L. J. Giffard "extends to all cases, whether the fraudulent appointment has been set aside by the Court, or revoked by the appointor."

Where execution is void for fraud, but further appointment is sufficient to cover all the estates.

In *Carver* v. *Richards* (27 B. 488; 1 D. F. & J. 548), A., in 1813, exercised her power of appointing among her children certain estates, including L., by appointing to her eldest son absolutely. This appointment was made on a bargain that the estates should be settled subject to A.'s life estate, to the use that her husband should receive a rent-charge for his life, and subject thereto to the use of the children of the marriage as A. and her husband should jointly appoint, or as A., if she survived, should by deed or will appoint; and the estates were so settled accordingly. In 1820, a joint appointment was made among the children, the L. estate being given to the eldest son; in 1826 slight variations of these appointments were made; on each occasion a power of revocation and new appointment was reserved to them jointly, or to A. if she survived. In 1827 the husband died. In 1829, the widow, by a deed, not noticing the invalidity of the appointment of 1813, and expressed to be made in exercise of the powers given her by the deeds of 1820 and 1826, or by the deeds recited in them, and of all other powers vested in her, made some slight variations of the dispositions of the deeds of 1820 and 1826, and subject thereto confirmed them. The original power was held well executed by the appointment of 1829. In this case there were apt words of general appointment, but it is clear that the appointor thought herself to be executing a totally different power from that under which the estate was held to pass; there were sufficient words, however, to enable the Court to say that the valid power was in each case executed.

But there may be cases in which appointments well made under a power might be held bad, if inseparably intermixed with a bad appointment, What is vicious may so far predominate over what is good, or the vicious and the good may be so mixed together, that the Court cannot give effect to the one and reject

the other. In *Carver* v. *Richards*, the intention was to distribute the property in the manner pointed out by the deed of 1829, and what was vicious in the mode of carrying out that intention was so far separable from the good, that the intention was held to prevail (1 D. F. & J. 566; and see *Birley* v. *Birley*, 25 B. 299).

A power once badly executed will not be well executed if there be no intention to execute.

34. It has been said that there must be some expression of an intention to execute the original power, for that the Court cannot hold that a power, which the donee thereof has once purported, though ineffectually, to execute, is executed by a subsequent instrument, in the absence of all expression of any intention to execute.

In *Jackson* v. *Jackson* (Dru. 91), where a father had a power of appointment among his children and exercised it by an appointment to his son, which was vitiated by a bargain for his own benefit, and subsequently inherited the estate as his son's heir, and disposed of it by his will in 1821, L. C. Sugden said that as all the circumstances of the case led him to believe that the father must have considered the power as not in existence at the date of his will, he was precluded from the possibility of attributing to him any intention of then executing it. He says, "It is clear upon the authorities, that if a man exercise a power improperly so that his execution of it is void, and he subsequently discovers his error, he may then exercise the power in the manner warranted by law. But in this case, there is this difficulty, that the father never retracted: he never desired to impeach the appointment, nor ever disclaimed it." It is to be observed that the father merely devised his estate and interest: there were no words purporting to execute any power. But Lord St. Leonards' remarks would seem to imply that it was his opinion that if a power be improperly executed, the execution must be retracted before the original power can be validly executed. It seems, however, from the cases above cited, that all that is requisite is an expressed intention to pass the property, the subject of the power, and apt words to execute the power.

Nor if the second execution be tainted

In *Askham* v. *Barker* (12 B. 499), a power of appointment among children was executed by a father on a bargain for his

with the fraud of the first.

own benefit; he afterwards executed another appointment, reciting the previous one and his desire of appointing such of the premises as remained unappointed, and appointed all the funds not comprised in the previous appointment, "and all other the sum and sums of money, messuages, lands, tenements, and trust estates whatsoever, comprised in or affected by the said recited indenture of settlement over or upon which he had a power of appointment or disposal." The Master of the Rolls said that the second execution was tainted by the fraud of the first, and was not valid and complete; the father was embarrassed by what he had previously done, which he thought and intended to be an execution of the power; he proceeded on that footing, and although he had used words which would have an operative effect if that power had never been previously attempted to be exercised at all, yet his reference to the power was clearly as if it had been previously executed.

And in *Farmer* v. *Martin* (2 Sim. 502), A. had a power to appoint 10,000*l.* among his younger children. In 1794, he appointed the whole sum to his two daughters, reserving a power of revocation; in 1804, he appointed 5,000*l.* to the said two daughters irrevocably; in 1806, he appointed the other 5,000*l.* to Eleanor on a bargain, which made it corrupt; in 1819, by deed reciting the appointment of 1806, he revoked (with Eleanor's concurrence) the appointment of 2,500*l.* to her, and appointed that sum to Ann, another object of the power, but provided that nothing therein contained should render void the appointment of 1806 to Eleanor. It was held that both the appointments to Ann and to Eleanor were void, partly on the ground that the whole appointment was so intermixed with that of 1806 that it could not be sustained; and partly because it was intended to be an execution of a power which the parties supposed to exist, but which did not in fact exist.

Lord St. Leonards doubts the authority of this case (Pow. 355), and see *Irwin* v. *Rogers*, 12 Ir. Eq. R. 159. In *Hutchins* v. *Hutchins* (10 I. R. Eq. 453), A. had power to appoint a perpetual rent-charge among certain objects. In 1850, he appointed the bulk of the rent-charge to B., one of the objects,

for life with remainder to his children, reserving a power of revocation. In 1858 he revoked the appointment of 1850, and appointed a large part to two of the children of B., reserving a power of revocation. In 1859 he entered into an agreement with the objects of the power that he should revoke the appointment of 1858, and make an irrevocable appointment in their favour, and that they should benefit him as therein provided. Being advised that this was bad, the parties abandoned the agreement; but in 1860 A. revoked the deed of 1858, and irrevocably appointed the rent-charge among all the objects; and sixteen days later an agreement was executed by A. and all the objects that the latter should confer upon him all the benefits provided for by the abandoned agreement. It was held that all the appointments were null and void as frauds upon the power.

When the first appointment has been set aside.

If the first appointment has been actually set aside by the Court, it is very difficult for the donee to made a valid re-appointment to the same person. In such a case, the burden of proof requisite to support the second appointment rests on the appointee. The reasons which in the case of a dealing between a solicitor and client throw the onus of proof on the solicitor, between a trustee and a *cestui que trust* on the trustee, between a parent and child on the parent, and in the class of cases to which *Huguenin* v. *Baseley* (14 Ves. 273) belongs, on the persons seeking to sustain the gift, apply with equal force as between the appointee in such a case and the persons entitled in default of appointment (*Topham* v. *Duke of Portland*, 5 Ch. 40). In that case an appointment made to H., an object of the power, was set aside as fraudulent, by reason of an antecedent agreement between the appointor and appointee: the appointor then appointed to H. again, and she and the appointor deposed that there was no agreement between them as to the disposition of the fund; but the appointment was set aside. L. C. Hatherley said that he gave implicit credence to the statements of the appointor and appointee: he also thought that it would be difficult to hold that H. had placed herself in such a position as to incapacitate herself under any circum-

stances from accepting a gift of the whole fund: he thought that a valid appointment might have been made to her of the fund, but the real point for consideration was, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one-half of it to her own use, and to hold the other half subject to the appointor's intentions and for his purposes did not, at the date of the last appointment and still, weigh on her mind with such force as to convert her into a mere passive instrument of the appointor's intentions, and whether such her sense of moral obligation was not well known to the appointor; and if so, whether he had taken any step to discharge her from it, and restore her to complete freedom of action?

Confirmation of void appointment by re-appointment, when events have made it possible.

35. Although the mere expression of a desire to confirm an invalid appointment will not establish it, yet if the appointor, having made an appointment which was, at the time of making it, invalid, afterwards does not merely express a desire to confirm such appointment, but proceeds to do so by way of appointment, then, if events have since happened which render such an appointment unobjectionable, it will be upheld.

In *Morgan* v. *Gronow* (16 Eq. 1), an ante-nuptial settlement contained the usual power of appointment among children. The husband, who survived, exercised it by appointing on such trusts, to take effect after the marriage of his daughter E., as she should appoint, and in default for her for life, with remainder as she should appoint by will. E. was unmarried at the time, and the appointment was therefore invalid. The donee of the power, after E. had married, executed a deed which recited his desire to confirm, and did actually confirm, the appointment. This was held good: the deed showed on its face a desire to confirm by an execution of the power: there was an intention to confirm, coupled with an express declaration that such confirmation was made by virtue and in execution of the power.

Execution of powers of revocation.

36. The same principles that apply to powers of appointment apply equally to powers of revocation: if therefore a man has power to revoke existing uses and limit new uses, and he afterwards by will devises all his lands having no others than those

subject to the power of revocation, they will pass (*Deg* v. *Deg*, 2 P. W. 415). But an appointment expressed to be made in exercise of every power enabling the appointor does not extend to property which the appointor cannot appoint without the exercise of a power of revocation, if there be other property to which the words of appointment can apply (*Pomfret* v. *Perring*, 5 D. M. & G. 775). The principles acted on in other cases with respect to the exercise of powers apply to cases of this sort. If a person has an interest in one subject and a power over another, and uses general words of disposition only, those words will not operate as an exercise of the power. It is otherwise when he has no interest but only a power. The same principle must apply to a case where a person has a power of appointment and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different, and the general words would then be held to be an exercise of the power (*Ibid.*; see *post*, s. 38).

Intention to revoke in all events.

If the intention to revoke in all events be clear, it makes no difference that the appointees substituted in place of the original appointees cannot take.

In *Quinn* v. *Butler* (6 Eq. 225), a testator, having power to charge real estate with 7,000*l.* to be distributed among his younger children as he should direct (but not exclusively), and in default of appointment among them equally, by will charged the said real estate with the 7,000*l.* and directed that 4,000*l.*, part thereof, should be paid to his younger son, and the remaining 3,000*l.* to his three daughters equally. He had no other younger children. By a codicil he revoked the appointment or charge of 7,000*l.* made by his will, and charged the same hereditaments with the payment of 7,000*l.* to the younger son alone. The Master of the Rolls said, "The whole question depends on the intention of the testator. If a will is simply revoked in order to make a gift in favour of another person, and you can see that there is no intention to revoke unless for that purpose,

then the doctrine of *Onions* v. *Tyrer* (1 P. W. 343) applies" (*i. e., cessante ratione revocandi cessat ipsa revocatio*). But it will be otherwise if the intention be to revoke in any case. In *Quinn* v. *Butler*, there could be no doubt that the intention was to revoke the will altogether. The codicil was an absolute and positive revocation of the charge: then there was a new charge of 7,000*l.*, and the whole of that was given to the son, and was therefore invalid. The case was in fact analogous to those in which a testator says by codicil that the legatees named in his will shall not receive anything, but that the fund shall be given to another object; there, although the latter cannot take the gift, the Court cannot speculate on whom the testator might have wished to confer the benefit in such an event (*Tupper* v. *Tupper*, 1 K. & J. 665; and see *Duguid* v. *Fraser*, 31 Ch. D. 449).

Extent of revocation.

But if the words of the clause reserving the power of revocation extend by necessary grammatical construction to some only of several appointments made by the same instrument, a subsequent execution of the power will not revoke all the appointments made by such instrument. In *Morgan* v. *Gronow* (16 Eq. 1), the donee of a power of appointment among children executed a deed in which he recited certain former appointments, and his desire to confirm them, and he accordingly thereby confirmed them: he then "directed and appointed" the devolution of other parts of the same fund; and he reserved a power to revoke "the direction and appointment" thereby made. He afterwards exercised this power. Lord Selborne held that, although the words of confirmation had been already held by him to operate in substance by way of re-appointment, yet as the deed, so far as language and phraseology were concerned, distinguished between the two operations, the one being on the face of it called confirmation, the other direction and appointment, the power of revocation was meant to refer to what had been done in terms by way of direction and appointment, and not by way of confirmation. And a deed of appointment, containing a power of revocation, must be acted on, although there is evidence of a subsequent appointment having been made, the

contents of which it is impossible to ascertain (*Rawlins* v. *Rickards*, 28 B. 370).

Revocation of wills executing powers by subsequent will.

37. In *Freeman* v. *Freeman* (Kay, 479, 487), V.-C. Wood says that "if there were a power to appoint by will, and if a good appointment were made by a will which referred to the power and contained other devises, and if subsequently there were another will, declared to be the party's last will, giving all his real estate and not revoking any previous instrument, he thought it would be extremely difficult to hold that the actual appointment made by the first will was in effect revoked."

Now the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior will, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim that no man can die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary, may be admitted to probate as together containing the last will of the deceased. If a subsequent testamentary paper be partially inconsistent with one of an earlier date, then such latter instrument will revoke the former as to those parts only where they are inconsistent (Williams on Executors, 8th ed. 165, cited in *Lemage* v. *Goodban*, L. R. 1 P. & D. 62, as representing the true result of the authorities; and see *Re Tenney*, 45 L. T. 78; *Hellier* v. *Hellier* 9 P. D. 237; as to the expression "last will," see *Pettinger* v. *Ambler*, 1 Eq. 510, 515; *Cutto* v. *Gilbert*, 9 Moo. P. C. 131. In *Leslie* v. *Leslie*, 6 I. R. Eq. 332, these words are said to be of no weight whatever. The use of the word "only" might perhaps have a different effect; see *Freeman* v. *Freeman*, 5 D. M. & G. 704, at p. 710). In that case, the words "last will" were held not to amount to a revocation of a former will, without words to that effect, as regarded real estate, though L. J. Turner seemed to think that it would be different as to personalty. In *Leslie* v. *Leslie*, however, the property was personal.

It would appear therefore that if, in the case put by V.-C. Wood, the power was a limited one, the subsequent will would

have no effect on the appointment made by the prior will, whether before or after the Wills Act. In *Freeman* v. *Freeman*, the will was before 1838.

In *Pitt* v. *Jackson* (2 Br. C. C. 51), the testator had power to appoint 20,000*l.* among his children. By his will, in 1768, he appointed 10,000*l.* to his daughter A., and also gave her a legacy of 30,000*l.* In 1771 A. married, and the testator gave her 40,000*l.* as a portion. A month later, he made a codicil whereby he revoked "the legacy of 40,000*l.*" given by his will to A. It was held that this revocation extended to, and revoked, the appointment of 10,000*l.* as well as the actual legacy of 30,000*l.*

But if a man, since the Wills Act, seised in fee of Blackacre and with a general power of appointment over Whiteacre, devises and appoints all his estates to B., and afterwards, without expressly revoking his former will, devises, but does not appoint, all his real estate to C., it seems that C. would take both Blackacre and Whiteacre.

In *Shiel* v. *O'Brien* (7 I. R. Eq. 64), a testator made a will by which he divided amongst his children all his own property, and also property over which he had a power given him by his marriage settlement; (it does not appear whether the power was general or limited). He afterwards made another will, which contained no words of revocation, by which he fully disposed of his own property but not of that over which he had a power of appointment. The two wills were made in paragraphs, and the latter appeared to be in many respects a copy of the former: the Court admitted the latter only to probate. The effect of this was to make the subsequent will, which contained no words of revocation or appointment, operate as a revocation of the appointment contained in the first will: the decision, however, rests on the peculiar circumstances of the case; (and see *Lemage* v. *Goodban*, L. R. 1 P. & D. 57).

Wills in execution of powers revoked by mere words of revocation without new appointment.

It was stated in the former edition that appointments made by will in execution of powers are not revoked by mere general words of revocation of all former wills without appointment, on the authority of *In b. Merritt* (1 Sw. & Tr. 112). But this case, and that of *In b. Joys* (4 *ib.* 214), must be

taken to have been overruled by *Sotheran* v. *Denning* (20 Ch. D. 99), and the rule must now be stated as follows :—

A general clause in a will revoking all former wills revokes a prior testamentary appointment.

In *Sotheran* v. *Denning* (*supra*), a married woman had a general power to appoint real estate by will. During her husband's lifetime she made a will exercising this power; and after his death she made a second will by which she revoked all former wills, and made a general devise and bequest of all her real and personal estate. She finally made a third will revoking all former wills and bequeathing all her personal estate, but not dealing with her real estate at all. It was held that the testamentary appointment contained in the first will was revoked by the second will, and the second will by the third; so that the real estate went as in default of appointment.

In *Harvey* v. *Harvey* (32 L. T. 141), testatrix, having a power by will to appoint real estate among her children, appointed it in equal moieties to her two children. By a second will she revoked all former wills, and devised and bequeathed all her real and personal estate to her daughter. She had no real estate except that over which she had the special power. Malins, V.-C., held that the second will revoked the former will, but did not operate as an exercise of the special power; and he declined to give the words of revocation the limited effect which they would have had prior to the Wills Act.

In *Re Kingdon, Wilkins* v. *Pryer* (32 Ch. D. 604), a married woman, having a special power of appointing real estate among her children, exercised that power by will in 1866. Her husband subsequently died, having left her all his real estate; and after his death she made three separate wills, in each of which she revoked all other wills. In the last she disposed of all her real and personal estate, "including as well real estate as personal estate over which I have or shall have a general power of appointment;" but she did not affect to exercise or mention her special power. Kay, J., held that the appointment of

1866 was revoked, and that the property went as in default of appointment; (and see *In b. Eustace*, L. R. 3 P. & D. 183).

What is a sufficient execution of a power of revocation.

38. A power of revocation and new appointment is not exercised by general words of appointment, if there is any other power to which the general words may refer, or (since the Wills Act) by a general devise or bequest, in the absence of all evidence of an intention to revoke.

"An instrument which exercises a power of revocation and new appointment must show, not merely an intention to appoint, but an intention to revoke the subsisting appointment" (*Re Wells*, 42 Ch. D. 646).

In *Pomfret* v. *Perring* (5 D. M. & G. 775), Turner, L. J., says (p. 780): "Here an actual appointment has been made with a power of revocation, and the appointment was to be undone before the power of new appointment would arise. To show that a power of this description has been exercised, it is not, I think, enough to show an intention to appoint; an intention to revoke the former appointment ought also to be shown. The principles acted on in other cases, with respect to the exercise of powers seem to me to apply to this. If a person has an interest in one subject, and a power over another, and uses general words of disposition only, these words will not operate as an exercise of the power. It is otherwise, when he has no interest but only a power. The same principle must, I think, apply to a case where a person has a power of appointment, and also a power of revocation and new appointment. The general words of appointment ought not to be held to be an exercise of the power of revocation. If there was no power except one of revocation and new appointment, it would be different: and the general words would then be held to be an exercise of that power. I think it clear that an intention must be shown to revoke and undo what has already been done."

In *Palmer* v. *Newell* (20 Beav. 32), Lord Romilly held that,

although a general gift in a will does by virtue of the Wills Act operate as an exercise of all general powers of appointment, yet it does not operate as an exercise of a power of revocation; (and see *Charles* v. *Burke*, 60 L. T. 380; 43 Ch. D. 223, n.; *Nanney* v. *Williams*, 22 Beav. 452; *Re Jones*, *Greene* v. *Gordon*, 34 Ch. D. 65; *Re Brace*, *Welch* v. *Colt* (1891), 2 Ch. 671).

In *Re Gibbes' Settlement*, *White* v. *Randolf* (37 Ch. D. 143), A., having a general power to appoint a fund "by his last will and testament or any codicil thereto or any writing in the nature thereof," duly executed what he designated a "testamentary appointment." A month afterwards he executed a will which contained a gift of all the rest residue and remainder of his estate and effects whatsoever and wheresoever, but contained no reference to the prior appointment. The will alone had been proved, the registrar refusing probate of the "testamentary appointment." North, J., held that the contrary intention, mentioned in the 27th section of the Wills Act, must appear in the instrument containing the residuary bequest or a codicil thereto; that he could not therefore look at the testamentary appointment to find a contrary intention; and accordingly that the will operated as an execution of the power of appointment and a revocation of the previous appointment.

The cases really show that a power of revocation must be expressly, and cannot be constructively executed; but the grant of the estate subject to the power would be sufficient; *post*, p. 268).

Revocation by marriage.

Before the Wills Act, a woman's will was revoked by her marriage, except in some cases of wills made in execution of powers (*Logan* v. *Bell*, 1 C. B. 872, and see *Douglas* v. *Cooper*, 3 M. & K. 381); a man's, by marriage and the birth of issue.

Wills Act, s. 18.

By the Wills Act, sect. 18, it is enacted that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin under the Statute of Distributions.

But a will made in execution of a power of appointment is

not revoked by a subsequent marriage, when in default of appointment the property of which it disposes passes under the settlement containing the power, although the same persons would take under such settlement as would have taken in case of intestacy under the Statute of Distributions (*In b. Fenwick*, L. R. 1 P. & D. 319; *In b. McVicar*, *ibid.*, 671; *In b. Worthington*, 20 W. R. 260).

Nor is such a will revoked by a subsequent marriage, when, in the event of certain contingencies happening, the property thereby appointed will not, in default of appointment, pass to the persons who would have taken in case of intestacy under the Statute of Distributions (*ibid.*).

A will under a power will be revoked by any act amounting to a revocation in law of a proper will (Sug. Pow. 458; *Reid* v. *Shergold*, 10 Ves. 370).

Revocation by invalid appointment.

A will is revoked by a subsequent defective execution of the power, if the defect be such as equity can aid (*Cotter* v. *Layer*, 2 P. W. 624).

But it will not be revoked by an absolutely invalid appointment. In *Eilbeck* v. *Wood* (1 Russ. 564), a married woman, donee of a power of appointment by will, duly made her will in execution thereof; she afterwards purported to appoint the property by *deed:* this appointment being absolutely void, was held not to be a revocation of the will; (and see *Ford* v. *De Pontès*, 30 Beav. 572).

But where A., having power by will to appoint personalty among her husband and children, by will appointed the fund equally between her husband and children, and afterwards, on the death of one of her children, made a codicil whereby she bequeathed the share, which would have gone to the deceased child had he survived her, to his two children who were strangers to the power; Kay, J., held that this did not amount to a revocation *pro tanto*, so as to make the share appointed to the deceased son go as in default of appointment; but that the whole fund must go under the appointment to the husband and surviving children of the appointor (*Duguid* v. *Fraser*, 31 Ch. D. 449).

39. An appointment under a power may be adeemed in the same manner as a specific devise or bequest; and if the appointor aliens the property subject to the power, he is to that extent to be taken to revoke his appointment. Ademption of appointments.

By the Wills Act, sect. 23, it is enacted: "No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death" (see 1 Jarm. 162). Wills Act, s. 23.

This section of the Act applies to cases where testators, having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower: but it does not apply to cases where the thing meant to be given is gone (Shelford, Real Property Stat., 520, 8th ed., cited with approval by Jessel, M. R., 15 Ch. D. 487). Application of sect. 23.

There is, however, considerable difference of opinion as to the effect of this section; Lord St. Leonards, V.-C. Malins, and Mr. Roper appearing to differ from Lord Romilly and Sir George Jessel.

In *Gale* v. *Gale* (21 B. 349), A. had a general power to appoint the reversion in fee of settled estates; and the trustees had a power of sale with A.'s consent, the proceeds to be held in trust to be reinvested in land to be held to the same uses, &c., as the lands sold. A. by his will appointed the estates to trustees on trust to sell and hold the proceeds for the benefit of certain persons named; and he gave all his estate "not hereinbefore specifically disposed of" to his widow. After the date of the will the estate was sold under the power of sale with A.'s consent. The Master of the Rolls held that the appointment was adeemed, and that the proceeds passed under the residuary gift to the widow. Lord St. Leonards (Pow. 308) disapproves of this decision as being a narrow construction of the Wills Act:

he considers that the power of appointment in A. was not destroyed by the execution of the power of sale, but was merely transferred to the property in its new state. "The testator did not intend the legatees to take the settled estate itself, but the produce of it, and that was precisely the condition in which the settled property stood at his death. The reinvestment of the money in another estate should have made no difference, for the disposition by the will was really of the settled property, and would embrace it in whatever shape it existed" (Sug. 308). Mr. Roper also disapproves of this decision (Legacies, 4th. ed. 332).

In *Collinson* v. *Collinson* (24 B. 269), a manor and lands were by settlement in 1836 vested in A. upon trust to sell and hold the proceeds for the children of the marriage as X. and Y. should appoint. In 1849 part of the settled land was taken by a railway company, and the purchase-money was laid out in the purchase of cottages which were conveyed to A. upon the trusts of the settlement. In 1851, by a deed-poll reciting the settlement and describing the property thereby settled, X. and Y. appointed that "all and singular the moneys to arise by the sale of the aforesaid manor, lands, and other hereditaments, pursuant to the trust in that behalf in the same indenture contained, and the stocks, funds, and securities in or upon which the same might from time to time be invested, and the interest, dividends, and annual produce to arise from such trust moneys and the said manor, lands, and hereditaments until such sale thereof as last aforesaid, and the rents, issues, and profits of the same manor, lands, and hereditaments should remain and be in trust" as therein mentioned. The Master of the Rolls held that the deed-poll did not operate as an appointment of the cottages.

In *Blake* v. *Blake* (15 Ch. D. 481), A. had a general power of appointment over the reversion in fee of a moiety of settled estates which the trustees had power to sell with the consent of A. and his wife. In April, 1873, parts of the land were sold, and the proceeds were paid to the trustees and by them invested in India stock. In the July immediately following these sales A. made his will, and, in exercise of his power, appointed his

moiety of the settled manors and hereditaments to his son in fee; and "subject and without prejudice to the appointment he had made of the moiety of the said manors and other hereditaments he gave, devised, and bequeathed all the real and personal estate of or to which he might have any power of appointment to his wife." The Master of the Rolls held that the appointment was to be read literally as applying only to the lands remaining unsold, and that the proceeds of the land sold passed under the residuary gift to his wife.

On the other hand, in *Re Johnstone* (14 Ch. D. 162), a married woman, having a general power over a settled fund, by her will, after reciting that by the settlement £3,606 bank annuities stood "settled upon trust for investment as therein mentioned," appointed "the sum of £2,000 bank annuities, part of the said sum of £3,606 like annuities" to A., "£1,000 bank annuities other part of the said sum of £3,606 like annuities" to B., and "the residue of the said sum of £3,606 bank annuities" to C. Part of the bank annuities were afterwards, with the consent of the appointor, and her husband, sold out, and the proceeds reinvested in railway stock; so that at her death the settled funds consisted of £2,000 railway stock and £1,087 bank annuities. Malins, V.-C., held that there had been no ademption "because when the testatrix doled out these sums she meant to appoint the fund which was subject to the settlement and over which she had the power of appointment; and this fund does not cease to be the fund subject to the power in the settlement by its being invested in a different security. It is not less the fund comprised in the settlement by its being invested in Great Western guaranteed stock."

In *Cooper* v. *Martin* (3 Ch. 47), an estate was devised on trust for sale, with power of pre-emption for the testator's younger children, and the proceeds were to be held on such trusts in favour of his children as A. should appoint before a certain period. Cairns, L. C., thought that an appointment of the estate *eo nomine* would have carried the proceeds of the sale of the estate if it had been necessary to sell it.

It is submitted that the question in each case is, whether, on The true test in these cases.

the true construction of his will, the testator has appointed the property subject to the power in whatever way invested, or whether he has appointed a specific property and nothing else. Is his expressed intention to execute his power, whatever may be the property subject to it at his death, or to give a particular estate, his title to dispose of which happens to arise from power, and not from property? V.-C. Malins (in *Re Johnstone*) thought the former; but it was a mere question of the construction of that particular will. In *Blake* v. *Blake*, the Master of the Rolls thought the latter; and there was the additional circumstance in that case that the will was made immediately after the sales, when they must have been fresh in the testator's recollection; and, moreover, that there was unsold real estate left to which the words of the will aptly applied. In *Gale* v. *Gale*, the property was given as a specific real estate. If the testator had given it by virtue of his estate, instead of his general power, the devise would undoubtedly have been adeemed; and it is difficult to see any reason for distinguishing between property and power in such a case. The 23rd section of the Act makes no such distinction, nor, it is submitted, can any distinction be drawn for this purpose between general and special powers; the utmost that can be said is, that there is perhaps more probability that a testator who appoints under a special power intends to appoint the property, whatever it may be, rather than to give a particular estate and nothing else. But this is not necessarily true in every case; and even if it were, seems too slight a ground upon which to found any distinction; (and see *Thompson* v. *Simpson*, 50 L. J. Ch. 461).

Mr. Jarman's last editors (i. 163) appear to consider *Gale* v. *Gale* wrong. But it is, with deference to them, submitted that the question is not so much whether the property has been converted out and out, or is subject to a trust for re-investment, as whether the words of the will are sufficient to carry the property in the condition in which it is found at the testator's death. It is difficult to see how the existence of a power of sale and a trust for re-investment of the proceeds thereof can make an appoint-

ment of Blackacre operate as if the words "or other property subject to the power at my death" were added thereto.

These cases must be distinguished from cases like *Walker* v. *Armstrong* (21 Beav. 284; 8 D. M. & G. 531), where a testamentary power, which had been executed, was destroyed by the exercise of a paramount power; and the Master of the Rolls held that the will could not be read as an exercise of a similar testamentary power substituted for the former power. On appeal, however, the documents were rectified.

Accession of legal to beneficial interest not ademption.

The mere accession of the legal to the beneficial interest does not operate as an ademption. Thus, in *Dingwell* v. *Askew* (1 Cox, 427), under a settlement, a married woman having a general power of appointment over personalty, appointed by her will during coverture. Her husband died in her lifetime, and the settled fund was afterwards transferred to her. She died without making any other will, and it was held by Kenyon, M. R., that the appointment was not adeemed; (so in *Clough* v. *Clough*, 3 M. & K. 296; and see *Lee* v. *Lee*, 6 W. R. 846; *Lawrence* v. *Wallis*, 2 B. C. C. 319).

These cases must, however, be distinguished from the appointment of a specific fund which is received by the appointor who changes the investment. In such a case the appointment is adeemed; but by reason of the change of investment, not of the transfer by the trustees to the appointor (*Jones* v. *Southall*, 32 B. 31, and cf. *Lee* v. *Lee*, *supra*); in *Jones* v. *Southall* the testator gave "all the share proportion or interest in or to which I may become entitled or interested in the personal estate of" X. deceased to trustees. The personal estate of X. was outstanding at the date of the will, but was subsequently got in, and the testator's share, which realised £5,370 Consols and £1,100 Reduced 3 per Cents., was transferred to him. He sold out the latter sum, and used the proceeds for his own purposes; but the Consols remained standing in his name. It was held that the mere transfer of the Consols to the testator did not affect his disposition thereof; but that the £1,100 had been adeemed by the testator's dealings with it.

Wills Act, 24.

40. By sect. 24 of the Wills Act it is enacted that "every will

shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Wills Act, s. 27.

By sect. 27, it is enacted that "a general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such general description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

It will be observed that sect. 24 does not provide that a will shall for all purposes take effect as if executed immediately before the testator's death; and the phraseology of sect. 27, "shall be construed to include," &c., appears to point to sect. 24 (see *Re Wells*, 42 Ch. D. at pp. 656, 657). This has some importance in considering the applicability of sect. 24 to limited powers.

One result of the joint operation of the two sections may be stated thus:—

General power may be executed by will prior to its creation.

A general power of appointment may be well exercised by a will executed previously to the creation of the power, and that, too, by a mere residuary gift (*Stillman* v. *Weedon*, 16 Sim. 26; *Moss* v. *Harter*, 2 Sm. & Giff. 458; *Patch* v. *Shore*, 2 Dr. & Sm. 589; *Boyes* v. *Cook*, 14 Ch. D. 53; *Airey* v. *Bower*, 12 Ap. Ca. 263).

Lord St. Leonards says (Pow. 305-6): "Where the property is settled by the testator himself upon others, in default of any appointment by him under his power, it would seem to require some indication of an intention by him to defeat his settlement, in order to hold a general gift in his will, which can be satisfied by other property, to be an execution of his power." But this doubt is not borne out by the cases; the 24th and 27th sections are express, "unless a contrary intention appear *by the will*." And in *Re Clark, Maddick* v. *Marks* (14 Ch. D. 422), James and Cotton, L. JJ., said that the Act ought not to receive a different construction as regards a power contained in a settlement created by the testator from that which it would receive in other cases.

In *Pettinger* v. *Ambler* (1 Eq. 510), B., by his will, dated in 1858, after specific devises, gave "all other real and personal estate of which he should die possessed or should have power to dispose" on certain trusts. By voluntary settlement in August, 1862, B. conveyed all his freehold property on trust after his death for E. for life, with remainder as B. should "by his *last will* or any codicil thereto" appoint, and, in default of appointment, for E. in fee. In November, 1862, B., by an instrument, commencing "This is the *last will* of me," &c., and not mentioning any former will, appointed under the power an annuity to be raised out of his freehold property, and devised his copyholds, but made no further disposition of the freeholds. The Master of the Rolls held that the will of 1862 was the only will intended to execute the power, and accordingly held that both the specific and the residuary devises made by the will of 1858 failed; but he said that if the testator had not made a will after the settlement, he should have held that the first will was an execution of the power.

This case is explained by the Master of the Rolls in *Hodsdon* v. *Dancer* (16 W. R. 1101). In that case real estate was settled in May, 1849, to such uses (in the events that happened) as F. R. D. should by deed or will appoint. In 1845 F. R. D. had disposed of the whole of his property by will. In November, 1849, he made another will, which only affected

personalty; it was held that on the true construction of the 24th and 27th sections, the disposition of the prior will was a good execution of the power contained in the subsequent settlement; (and see *Cofield* v. *Pollard*, 5 W. R. 774).

In *Meredyth* v. *Meredyth* (5 I. R. Eq. 565), a testatrix in 1860, devised her real estate to certain uses; she then gave legacies, and declared that her trustees should have power to raise by sale or mortgage sufficient to pay her debts and legacies, if her personal estate should prove insufficient. In 1862, she settled her estate, reserving a paramount power to charge 1,000*l.* for her own benefit. She afterwards made a codicil, giving a legacy and confirming her will. The Master of the Rolls was of opinion that the will was an express exercise of the power of charging, but at any rate the will and codicil together, without reference to sect. 27, operated as an execution.

In *Re Old, Pengelley* v. *Herbert* (54 L. T. 677), A., the day after her marriage, made her will as follows: "in pursuance and exercise of the power of appointment vested in me by the settlement executed previously to my marriage, and of every other power enabling me, I hereby appoint, give, and bequeath all the property settled by me on my marriage and over which I have any disposing power to my dear husband." Subsequently her uncle died, leaving her a legacy for life with remainder as she should appoint. Pearson, J., held that the will operated to exercise the power which she had over the legacy.

It will be observed that this case was a mere question of construction. The Court in effect read "*and*" as "*or*," so as to make the words of appointment co-extensive with the recited intention of executing all powers.

On the other hand, in *Re Ruding* (14 Eq. 266), J. C. R. transferred a sum of stock to trustees on trust for such persons as he should by deed or will appoint, and in default of appointment, for three persons named. J. C. R. had previously made a will, which would operate as an execution of this general power. V.-C. Malins considered that the evidence afforded by surrounding circumstances showed that the testator did not

intend to execute this power. But it does not appear how evidence of surrounding circumstances can be admissible in such a case; the statute says, "unless a contrary intention appear *by the will*." And in *Scriven* v. *Sandom* (2 J. & H. 743), V.-C. Wood says: "There is no contrary intention within the meaning of the statute, unless you find something *in the will* inconsistent with the view that the general devise was meant as an execution of the power;" and see his judgment in *Thomas* v. *Jones* (2 J. & H. 475).

The contrary intention must appear by the will.

The decision in *Re Ruding* may now be taken to be overruled by *Boyes* v. *Cook* (14 Ch. D. 53) and *Airey* v. *Bower* (12 App. Ca. 263); and see *Re Clark* (14 Ch. D. 422); *Re Hernando* (27 Ch. D. 284); *Re Marsh* (38 Ch. D. 630).

In *Airey* v. *Bower* there were strong words of futurity which were much relied on, as taking the case out of the rule above stated. The power was a general power to the settlor by deed or will "from time to time or at any time *hereafter*" to appoint, and was contained in a settlement made in 1855. The settlor had in 1854 by her will made a general residuary devise and bequest of all her real and personal property. The House of Lords held that the power was exercised by the will; and Lord Macnaghten added: "The case is, perhaps, distinguishable from *Boyes* v. *Cook*; the words of futurity are more emphatic; but I think it would be very unfortunate if at this date the beneficial effects of the Wills Act were frittered away by such nice distinctions." He thought the case might also fall under sect. 23.

Words of futurity in power insufficient to exclude rule.

In *Thompson* v. *Simpson* (50 L. J. Ch. 461), Kay, J., appears to have held that an express reference to an existing general power was sufficient evidence of a contrary intention within the meaning of the Act to prevent the will from executing a general power over the same property, created after the date of the will by an exercise by deed of the prior power. But the case is very shortly reported.

The circumstance that a residuary devise contained limitations *during the life of B.*, is not conclusive evidence of an intention not to execute a power, which would only come into exist-

ence in the event of B. predeceasing the testator (*Thomas* v. *Jones*, 2 J. & H. 475).

But a man can execute only such powers as are given to him during his lifetime; he cannot execute a power given by the will of a person who survives him, unless sect. 33 of the Wills Act applies (*Re Hensler*, 19 Ch. D. 612). In *Jones* v. *Southall* (32 B. 31), A. by his will gave personal estate to such persons as B. should appoint. B. made his will, but died before A.; it was held not to be an execution of the power.

Effect of republication of will before Wills Act.

Before the Wills Act, the republication of a will after the creation of a power in the testator would not operate to make the will, executed prior to such creation, an execution of the power (*Cowper* v. *Mantell* (No. 1), 22 B. 223).

How far rule applicable to limited powers.

41. There does not appear to be any case in the books in which the applicability to limited powers of the rule stated in the preceding section has been determined. It is open to question whether sect. 24 in terms applies to limited powers at all: it is at least doubtful whether property appointed under a limited power can be said to be real or personal estate "comprised in" the will: the execution of such a power does not in any way bring the appointed property into the will, but operates as a nomination of the persons whose names are to be inserted as beneficiaries, in lieu of the power of appointment in the instrument creating such power. Further, sect. 27 does not extend to limited powers (see *post*, sect. 42). The testator must, therefore, show an express intention to execute; and if regard is to be had to the date of the will as evidence of intention (as in *Re Wells*, 42 Ch. D. 646), there must be many cases in which no intention to execute can be found (see *Cave* v. *Cave*, 8 D. M. & G. 131). There is, also, the further objection that limited powers are exerciseable for the benefit, not of the donee, but of the objects of the power; and that the appointor has a moral duty to perform in distributing the fund fairly and in accordance with the requirements of the objects of the power, having regard to all the circumstances. It is difficult to see how he can discharge this duty by a will made before the existence of the power which he is supposed to execute. If this objection, however, is sound, it extends to all cases, including those where a

testator expressly refers to future as well as existing powers. It is suggested that the objection is to some extent supported by the reasoning of the cases where a limited power to the survivor of two persons has been held not well executed by the actual survivor by a will made during the joint lives (see *ante*, sect. 15, p. 158).

In *Re Wells*, *Hardisty* v. *Wells* (42 Ch. D. 646), a testator had a limited power of appointment among children. He made a will in 1869 in express exercise of the power; and in 1878 executed a deed by which he made a different disposition of part of the settled property, and reserved to himself a power of revocation. Stirling, J., held that in ascertaining the testator's intention he was entitled to regard the date of his will; and, without expressly deciding that sect. 24 of the Wills Act did not extend to limited powers, he held that it had not the effect of making the will speak from the death for all purposes, and that the fact that the will was dated before the appointment of 1878 negatived any intention to execute the power of revocation reserved by that appointment.

Effect of sect. 27.

42. The Wills Act, sect. 27, introduced an important alteration in the law relating to appointments by will, but the section applies only to general powers. The law before the Act is thus stated by Lord St. Leonards in *Lake* v. *Currie* (2 D. M. & G. 547): "It is clearly settled that a general devise or bequest will not, independently of the Wills Act, operate as an execution of a power; but it is also settled (*Roake* v. *Denn*, 1 Dow & C. 437; *Grant* v. *Lynam*, 4 Russ. 292), that where a testator disposes of *real estate*, not having any other than what is subject to the power, he is in such a case to be taken as dealing with that estate; and that, both as to realty and personalty, if the Court is satisfied, by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power. . . . . The intention of the Statute of Wills was to extend, and not to narrow, the operation of devises. It is now absolutely necessary to show a contrary intention to exclude the execution of a power,

while under the old law it was needful to show the intention to execute the power."

Powers may be executed by what general words.

Appointment of residuary legatee.

It has been held (*Re Spooner*, 2 Sim. N. S. 129), that the words, "I constitute A. B. my residuary legatee," mean the same thing as "I give all the rest and residue of my personal estate to A. B." And, although *primâ facie* the words only extend to personal estate (*Kellett* v. *Kellett*, 3 Dow, 248; *Windus* v. *Windus*, 21 B. 373; 6 D. M. & G. 549), the term "residuary legatee" is one "which must be fashioned and moulded by the context; and if you have a context in which the testator is found looking at his landed property, not as land, but as something which is all to be sold and turned into money, then the term 'residuary legatee' becomes a term as applicable to the proceeds of landed property as it would have been in the first instance to personal property" (*per* Lord Cairns, in *Singleton* v. *Tomlinson*, 3 App. Ca. at p. 418); and for an example of a residuary gift not within sect. 27, see *Wilkinson* v. *Schneider* (9 Eq. 423).

Bequest of "my personal estate."

A bequest of "my personal estate" is the natural way of expressing "a bequest of personal estate of the testator" within sect. 27 (*Chandler* v. *Pocock*, 15 Ch. D. 491; 16 *ibid.*, 648). It is not the less general because the testator uses the word "my." By the joint effect of sects. 24 and 27 a bequest of "my personal estate" should be read as if it included the words "I appoint all the personal estate over which I shall at my death have a general power of appointment" (*ibid.*). In *Chandler* v. *Pocock* the question was whether a bequest of "the residue of my personal estate" passed consols which represented the proceeds of sale of lands, settled on the testatrix for life, with remainder to her issue, with remainder to her testamentary appointees. She never had issue, and the lands had been sold under a power of sale in the settlement, the proceeds being subject to a trust for reinvestment in land, and the consols, representing the purchase-money, had been transferred to the testatrix. It was held that they passed under the appointment contained in the residuary gift as personal estate. It will be observed that no one but the testatrix had any right to call

for a reinvestment in land: the property was in fact personal estate, and the equity to treat it as land could only arise if the testatrix did not appoint. "What the authorities decide is this, that where there are persons entitled to an immediate interest who, after the death of the testator, have still a right to call for the investment of money in land, there it is real estate of the testator, and a gift of 'my real estate' would pass it; but a gift of 'my personal estate' would not" (15 Ch. D. 499; acc. *Re Greaves*, 23 Ch. D. 313).

Devise of "my real estate."

A devise of "my real estate," by the joint effect of sects. 24 and 27, passes all real estate over which the testator has a general power at his death, including real estate which he has appointed specifically in the earlier part of his will, and the appointment of which has lapsed (*Freme* v. *Clement*, 18 Ch. D. 499). It is submitted that so much of the judgment in this case as applies to general powers is untouched by *Holyland* v. *Lewin* (26 Ch. D. 266).

Evidence of state of testator's property when admissible.

43. There is a distinction between testamentary gifts of real and personal estate, which before the Wills Act was of considerable practical importance; but which, though still in theory existing, appears to be now of little, if any, weight. Before the Act, the distinction in question applied to all powers, whether general or limited: since the Act, the distinction applies to limited powers only. The rule is this:—

> In a gift of real estate, the Court may examine whether the circumstances of the testator's property are such as to give effect to the will: in a gift of personalty, the Court cannot look beyond the will.

"Whatever is the inadequacy of a testator's property to satisfy the terms of the will, and whatever may be the conviction of the Court of his intention to execute the power, the state of his personalty at the time of the will or the death cannot be examined for the purpose of collecting evidence of his intention"

(*Jones* v. *Curry*, 1 Sw. 66; *Jones* v. *Tucker*, 2 Mer. 533; *Lovell* v. *Knight*, 3 Sim. 275; *Lemprière* v. *Valpy*, 5 Sim. 108; *Dummer* v. *Pitcher*, 2 M. & K. at p. 275; *Grant* v. *Lynam*, 4 Russ. 292), where the rule was extended to leaseholds; and *Standen* v. *Standen* (2 Ves. jun. 589; 6 Bro. P. C. 193), where it was held that the donee of a power of appointing both real and personal estate executed his power over both by general words. In that case, the testatrix had no real estate of her own; this fact, which was admissible in evidence according to the rule above stated, showed her intention to execute her power, and that when she talked of her real estate she meant the real estate subject to the power, and the same intention was held to govern the entire gift (Sug. Pow. 338).

Is there any difference in the case of a married woman?

There are authorities to be found in the books which draw a distinction in the case of married women, on the ground originally suggested by Lord Hardwicke in *Churchill* v. *Dibben* (3 Lord Kenyon, 68, 81, shortly reproduced in 9 Sim. 447, n.): "Because the Court must think it a will meant to execute a power, though there is no reference to it, which makes no difference; it can have no other sense. By the very act of making a will, she could have nothing in view but to execute the power. That is plain, because, as a feme covert, she had no other capacity than what was reserved to her by the settlement, which differs this from what it would be if the words could mean a disposition of other lands than what are comprised in the power. If a man had power, by appointment, of disposing of particular lands, and other lands of his own in fee, there the latter would satisfy the residuary devise. But here the testatrix must be intended by this disposition to have executed the only power she had. How are the goods and chattels to pass but by the power? In that way they may, because the settlement has made them her separate estate."

This view was adopted by V.-C. Stuart in *Attorney-General* v. *Wilkinson* (2 Eq. 816). In that case a testatrix, having by her marriage settlement power by will or deed to appoint a certain sum of stock, by her will dated 1822, and not referring in terms to the power, gave "all her property and estate whatsoever and

wheresoever, and of what nature, kind, and quality soever the same might be," to her husband absolutely. The Vice-Chancellor held this a good execution of the power. He said that the property subject to the power proceeded entirely from the testatrix (it was a fund brought into settlement by her on her marriage), and although her will did not refer to the power, it could have no operation at all unless treated as an execution of the power. Although the words of the will did not mention the particular fund which was subject to the power, as it did not appear that she had any other property, there was none other on which the will would operate; (*Curteis* v. *Kenrick*, 3 M. & W. 460; 9 Sim. 443; and *Shelford* v. *Acland*, 23 B. 10, are to the same effect; see, too, *Evans* v. *Evans*, 23 B. 1). On the other hand, the contrary was decided in *Lovell* v. *Knight* (3 Sim. 275), and *Lemprière* v. *Valpy* (5 Sim. 108; 9 Sim. 447); and it is submitted that the latter cases are correct, and that there is no distinction in this respect between wills of married women and those of other people; for a married woman had not an absolute testamentary incapacity: she might have separate estate; of this she could certainly dispose by her will: and she might also make a will with her husband's concurrence. Since the Married Women's Property Act, 1882, moreover, women, married before the 1st January, 1883, can dispose by will of property their title to which accrues after the 31st December, 1882; and women, married since the latter date, of all their property.

Evidence admissible where specific fund referred to.

The latter clause of the rule never applied to cases where the will referred to a specific fund. Where a gift is *primâ facie* specific, evidence of the state of the property at the date of the will is admissible (Wigram on Evidence, p. 51, pl. V.; *Innes* v. *Sayer*, 3 M. & G. 606; *Shuttleworth* v. *Greaves*, 4 M. & Cr. 35).

In *Mackinley* v. *Sison* (8 Sim. 561), a spinster, having a general power of appointment over a fund of 3 per Cent. Consols, made her will whereby she gave several pecuniary bequests, and directed that they should be paid "out of the moneys invested in my name in the 4 per Cent. Government Securities." It was admitted that she had no such securities, and that the only

property of any kind which she possessed was the fund of consols over which she had a power. It was held that she must have intended to execute the power; (and see *Elliott* v. *Elliott*, 15 Sim. 321; and *Walker* v. *Mackie*, 4 Russ. 76).

In *Re Gratwick* (1 Eq. 177), a widow, having a life interest in a sum of consols with a power of appointment among her children, who took equally in default of appointment, by her will, without referring to the power, bequeathed all money belonging to her "in the 3 per Cent. Consols, or in any other stocks or funds of Great Britain, with the dividends thereon, and all other moneys that she might die possessed of or become entitled to," to her two surviving children and her daughter-in-law equally. The testatrix was not at the date of her will or at her death possessed of any government funds, except so far as she had a life interest in the fund subject to the power. The M. R. held that she must have intended to exercise the power, and that her will operated as a good appointment of two-thirds of the fund, and that the other one-third went as in default of appointment.

Effect of Wills Act on the rule.

The rule is of less importance since the Wills Act. The object of the inquiry was to ascertain whether the testator, who purported to dispose of real estate, had anything on which the words of his will could take effect; the inference being that, if he had none of his own, but had power to dispose thereof, he must have intended to exercise his power, because there was nothing else to which the words could refer. But since the Wills Act, every will is to be construed, with reference to the real and personal estate comprised in it, to speak from the testator's death (sect. 24); and the inference therefore no longer arises. The inquiry, however, is still possible, because all devises of real estate are still specific (*Lancefield* v. *Iggulden*, 10 Ch. 136); but it is practically useless, because, if answered in the negative, no presumption necessarily arises that the testator must have meant to execute his power; (see *Re Mills*, 34 Ch. D. 187; *Harvey* v. *Harvey*, 32 L. T. 141; 23 W. R. 478). The question can hardly arise, since the Wills Act, except in cases of gifts to the objects of a limited power.

Extent of applicability of section 27.

The 27th section does not apply to limited powers (*Clowes* v. *Awdry*, 12 B. 604; *Re Williams*, *Foulkes* v. *Williams*, 42 Ch. D. 93); but it does apply to married women having general testamentary powers exercisable during coverture (*Bernard* v. *Minshull*, John. 276). And a direction that a fund (over which a power of appointment to whom she pleases is given to A.) is not to be distributed till twelve months after A.'s death, will not prevent the power from being general within this section (*Re Keown*, Ir. R. 1 Eq. 372). But a power to appoint "by will expressly referring to the power" is not a general power within sect. 27 (*Phillips* v. *Cayley*, 43 Ch. D. 222, overruling *Re Marsh*, 38 Ch. D. 630; and see *Davies* v. *Davies*, (1892) 3 Ch. 63). Nor, *semble*, is a power to appoint by will executed after A's death (43 Ch. D. 230). But no stress can be laid on the word "hereafter" (*Airey* v. *Bower*, 12 Ap. Ca. 263). It has been held in Ireland (*Edie* v. *Babington*, 3 Ir. Ch. R. 568) that a power to appoint to any one except A. is a general power, so as to make the appointed fund assets for the payment of the appointor's debts; but such a power was held in *Re Byron*, *Williams* v. *Mitchell* (1891, 3 Ch. 474), not to be a general power within sect. 27 of the Wills Act.

The intention of the Legislature was to abolish the distinction between property and general powers, and to make it unnecessary in framing a will to refer to the instrument creating the power, or to the subject of the power; accordingly the fact that a testator has described property subject to a general power, as his own absolutely, does not exclude the operation of the section (*Frankcombe* v. *Hayward*, 9 Jur. 344). So a direction for the payment of debts and the appointment of an executor will operate as an execution of a general power since the Act (*Wilday* v. *Barnett*, 6 Eq. 193); to the extent necessary to pay the debts (*Laing* v. *Cowan*, 24 B. 112; *Re Ickeringill*, 17 Ch. D. 151). A direction for the payment of debts without more will also be sufficient; but (*semble*) not the appointment of an executor without more (*Re Davies*, 13 Eq. 163); although Jessel, M. R., appears to suggest that it would be enough (*Re Pinède*, 12 Ch. D. 667). In *Re Thurston* (32 Ch. D. 508), Chitty, J., held that the

appointment of an executor was not sufficient; and see *post*, sect. 46, p. 237.

Legacies.

Legacies are bequests of personal property described in a general manner (*Hawthorn* v. *Shedden*, 3 Sm. & Giff. 293). In *Re Wilkinson* (4 Ch. 587), a testatrix had a general power of appointment over various sums of money. She gave several pecuniary legacies, and then gave the residue, subject to the payment of her debts, to two persons, one of whom was also an executor. The Court held that these legacies were good appointments under the power, saying that it would be difficult to draw any distinction between a gift of the whole and a gift of legacies, which is merely dividing the gift into three or four portions instead of giving it in one. L. J. Giffard said that if there was a gift of 100*l.* he did not see why that should not be part of the personal estate of which the testator had power to dispose. This overrules *Hurlstone* v. *Ashton* (11 Jur. N. S. 725).

In *Wilday* v. *Barnett* (6 Eq. 193), there was an express appointment of an executor, and a direction that he should pay the debts and expenses out of the personal estate; there was then a gift of legacies and a gift of the residue. The Master of the Rolls considered that the will had in effect appointed the property to the executor for the purpose of paying debts and expenses, and that it is the duty of an executor to pay the legacies out of a fund so appointed to and vested in him; that being so, he thought that the gift of the residue was not an execution of the power in favour of the residuary legatee, but a gift of so much of the fund previously appointed to the executor as should remain after payment of the debts, expenses and legacies.

In *Re Keown* (1 I. R. Eq. 372), there was a direction by will to executors to call in, receive, and raise the several moneys the testatrix should die possessed of or entitled to, and apply the same in payment of debts, funeral expenses, and legacies. The will proceeded: "And I appoint that in case there should be a sufficient overplus, my executors should pay to J. J. and H. M. 100*l.* each; and whatever money may be over and above after

they are paid, I request that my executors may apply as I shall direct them by letter." There was no other residuary bequest, and no letter. The testatrix had a power of appointing a sum to be raised out of real estate to whom she pleased, such sum not to be distributed until twelve months after her death. It was held that this general power was well exercised, and that the next-of-kin of the testatrix were entitled to it.

Contrary intention must appear on will.

44. In order to negative the execution of a general power by a general devise or bequest it is necessary to show a contrary intention; and such contrary intention must appear on the will itself (sect. 27) (*Lake* v. *Currie*, 2 D. M. & G. 536; *Hutchins* v. *Osborne*, 4 K. & J. 252; 3 De G. & J. 142; *Re Clark*, *Maddick* v. *Marks*, 14 Ch. D. 422).

In *Lake* v. *Currie*, *supra*, two estates were so settled that over estate A. the testator had no power of disposition, while over estate B. he had a general power. The testator by his will confirmed the settlement, and, reciting that he was seised of considerable real estate and might become seised of more, he devised all the real estate of which he might die seised or possessed upon trusts differing from those of the settlement. In fact he had no interest, either at the date of his will or at his death, in any other estates than A. and B. It was held that the confirmation of the settlement was intended only to operate on the A. estate which was settled absolutely, and was no evidence of an intention not to exercise the general power over the B. estate; and that accordingly the general devise operated to appoint the latter estate.

In *Hutchins* v. *Osborne*, *supra*, a husband, having under his marriage settlement a general power of appointment over leaseholds, made his will, and after giving certain legacies made a general residuary devise and bequest, "subject to the payment of the before mentioned legacies, and subject also as to such parts thereof respectively as are comprised in" his marriage

settlement, which he thereby confirmed and ratified in all respects, to his wife absolutely. The V.-C. and the L. JJ. held that the ratification of the settlement was not evidence of an intention not to exercise the power, and that the residuary bequest operated as such exercise.

Effect of lapse on exercise of powers.

45. "The general rule of equity relating to lapses is equally applicable, whether the legacy be given under a will made by virtue of donorship flowing originally from the testator, or whether it be given under a power created for the purpose: for in the latter case, although the legatee will take under the authority of the power, yet he will not be considered as taking from the time of its creation, so as to prevent a lapse occasioned by the death of the legatee before the appointor, when the power is executed by will" (1 Roper on Legacies, 494).

"The meaning that persons must take under the power or as if their names had been inserted in it, is that they shall take in the same manner as if the power and the instrument executing it had been incorporated in one instrument: then they shall take as if all that was in the instrument executing had been expressed in that giving the power" (*per* Lord Hardwicke in *Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. Sen. 61, 78).

Wills Act, sect. 33.

The 33rd section of the Wills Act enacting that a bequest to a child of the testator who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, applies to a testamentary appointment made in execution of a general power (*Eccles* v. *Cheyne*, 2 K. & J. 676); but not to such an appointment made in execution of a limited power (*Griffiths* v. *Gale*, 12 Sim. 327, 354; *Freeland* v. *Pearson*, 3 Eq. 658, 663; *Holyland* v. *Lewin*, 26 Ch. D. 266). In the last-named case reliance was placed on certain dicta of Jessel, M. R., in *Freme* v. *Clement* (18 Ch. D. 499, 515), which seemed to imply that the M. R. was in favour of extending the section to appointments under special powers. But Lord Selborne said that "the words 'devise' or 'bequest,' when used in the Wills Act without any indication of an intention that they should apply to appointments under powers, ought *primâ facie* to be understood in their

ordinary sense, viz., as referring to a gift by will of the testator's own property and nothing else."

The interest of persons taking in default of appointment does not lapse by reason of the death of the intended appointor in the lifetime of the donor of the power (*Edwards* v. *Salaway*, 2 Ph. 625; *Nichols* v. *Haviland*, 1 K. & J. 504).

From what date appointee takes.

And it may here be added that although the appointee takes under the authority of the power, and as if "the instrument executing had been expressed in that giving the power," yet he does not take as from the date of the creation of the power so as to benefit by or include an appointment made to him by will which fails by his death before the death of the appointor, the donee of the power (*Duke of Marlborough* v *Lord Godolphin*, 2 Ves. Sen. 61, 80). And in this respect, the difference between an appointment by will and one by deed must be borne in mind. The latter is an act complete in itself, and the thing appointed vests from the execution of the instrument making the appointment; whereas in the former case the death of the appointor is necessary to make the act complete and to make the subject of the power pass (*ibid.*).

Extent to which a general power is to be taken as executed.

46. In cases of wills exercising a general power of appointment, it is a question of intention whether the donee of the power meant by the exercise of it to take the appointed property out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed (*Re De Lusi's Trusts*, 3 L. R. Ir. 232; *Re Pinède's Settlement*, 12 Ch. D. 667; *Re Van Hagan*, 16 Ch. D. 18). And there is no difference in this respect between real and personal estate (*Re Van Hagan*, *ibid.* 31).

Intention, how to be discovered.

The question arises in the case of appointments which fail by reason of the death of the appointee in the lifetime of the testator; and the difficulty lies in the necessity of discovering

an expression of intention to provide for an event which in most cases the testator never contemplated. The earlier cases seemed to warrant an absolute division of the cases into two classes; one of appointments to the beneficiary direct, and the other of appointments to a trustee for such beneficiary, whether also executor or not (*Lefevre* v. *Freeland*, 24 B. 403). But the later authorities do not bear out such a division. The following propositions are submitted as guides to the discovery of the intention of the testator.

Three rules as guides to discovery.

(1) If there be an appointment to trustees for the appointee, and the latter predeceases the testator, the inference is that the testator intended to withdraw the appointed fund from the operation of the instrument creating the power, and to vest it in the trustees of his will, who hold it upon the same trusts as if it had been the appointor's own property (*Chamberlain* v. *Hutchinson*, 22 B. 444; *Wilkinson* v. *Schneider*, 9 Eq. 423; *Re Davies*, 13 Eq. 166). It is a mere case of resulting trust; the persons entitled in default of appointment have no equity to make the trustees of the will trustees for them; and the trust can therefore result only for the benefit of the testator and his estate (*Re Van Hagan*, 16 Ch. D. 18).

(2) But the same inference does not arise if the testator does not appoint to trustees of his own, but directs the trustees of the instrument creating the power to hold a specific property in trust for a person who predeceases him (*Re Thurston*, 32 Ch. D. 508). The testator may, however, show by other means that he makes the property his own; and in that case the fact that the trustees of the instrument creating the power are directed to hold on trust for appointees who predecease the testator, is not enough to exclude the inference (*Re Pinède*, 12 Ch. D. 667). In that case the testatrix, in exercise of a general power in a settlement, appointed that the trustees of the settlement should stand possessed of the trust funds on trust to pay certain legacies, which by reason of lapse and other circumstances did not exhaust the funds, to certain persons named. She gave her husband 2,000*l.* contingently, and authorized her executors to pay it unless she gave them notice in writing to the contrary during

her life. She directed payment of her funeral and testamentary expenses by her said trustees out of her said trust property, and gave all the residue of her property to her nephew, who predeceased her; and she appointed two of the three trustees of the settlement and another person executors of her will. Jessel, M. R., held that the testatrix had made the fund her own for all purposes; and see *Brickenden* v. *Williams* (7 Eq. 310), where the trustees to whom the appointment was made were also executors.

In *Goodere* v. *Lloyd* (3 Sim. 538), where A. had power to appoint 700*l.*, and by her will appointed it to X., Y., and Z., in trust, and appointed them executors, but never declared any trusts of the 700*l.*; and she also bequeathed all her personal estate to X., Y., and Z., *in trust*, subject to payment of debts and legacies: it was held that the 700*l.* went to the person entitled to A.'s residuary estate. In *Lefevre* v. *Freeland* (24 B. 403), A., under a general power, appointed by will to X. and Y. on certain trusts, which did not exhaust the fund, and bequeathed to X. and Y. her residuary estate upon certain trusts after payment of her debts, &c., and appointed B. and C. executors. It was held that the surplus formed part of the appointor's estate, notwithstanding that the trustees were not executors.

(3) If there be an appointment to A., who dies before the testator, no inference can be drawn from the mere appointment by itself of an intention to make the property the testator's own for all purposes (*Re Davies*, 13 Eq. 163). But there may be other *indicia*, such as treating the appointed fund and the testator's own property as one mass, and charging the entirety with debts and expenses and appointing executors, which will enable the Court so to hold (*Re Ickeringill*, 17 Ch. D. 151; *Willoughby-Osborne* v. *Holyoake*, 22 Ch. D. 238), although the appointment of an executor alone would probably not be enough (*Re Thurston*, 32 Ch. D. 508).

It has been said (13 Eq. 166) that there is "great difficulty in construing an appointment of, for instance, an equitable interest in a money fund to A. in trust for B., as differing from

an appointment of the same fund to B.; and doubts might be suggested as to the effect of such a gift where A. died before the testator as well as B., or where there is an appointment, for example, to a person in trust for A. for her separate use, with remainder to her children, no executor being appointed, and there being no children."

It has been suggested that the testator knows that when an appointment is made to A. in trust for B., the appointed fund becomes assets for the payment of debts, whether B. predeceases the testator or not (*Re Van Hagan*, 16 Ch. D. 18); and that this may be a reason for holding that an appointment to a trustee for the appointee is effectual, although the appointee predeceases the testator. But it may be doubted if there is any distinction between the two cases. No authority has yet determined whether an appointment by any one, not being a married woman, to A., which lapses, does or does not make the appointed fund assets for payment of the testator's debts; it does so if the appointment is residuary, and debts are directed to be paid (*Re Davies*, 13 Eq. 163). In that case, S. D. who had a general power under her husband's will, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate to M., E., W., and J. equally, and appointed an executor. M. and J. died in the testatrix's lifetime. V.-C. Wickens said that there was such an appointment as, under the old law, would have made the fund assets for the payment of debts, and, under the new law, for the payment of legacies also. Then there was a general gift and appointment of residue which failed as to two-fourth parts: the question was whether those two-fourth parts (after payment of all debts and legacies) were effectually appointed for every purpose: no authority seemed to go so far, and he accordingly held that the two shares went as in default of appointment to the husband's next of kin.

This was followed in *Re De Lusi* (3 L. R. Ir. 232). In that case a married woman, having under her settlement a general power of appointment by will over a fund, made her will which she declared to be an appointment as well of all the estates and

property comprised in her settlement subject to her husband's life interest as of all other property of which she might die seised or possessed or have power to appoint, and thereby appointed part of the fund in favour of A. and his children, and in default of any child of A. she appointed that such part of the fund should fall into her residue; and she appointed B. her "residuary legatee and appointee," and appointed executors. B. predeceased the testatrix; and it was held that the surplus portion of the fund, over and above that portion appointed in favour of A., lapsed by the death of B., and passed as unappointed to the persons entitled in default of appointment.

On the other hand, in *Re Ickeringill* (17 Ch. D. 151), a testator gave a fund to A. upon trust to pay the income to B. for life for her separate use, and after her death in trust as B. should by deed or will appoint, and in default of appointment for A. absolutely. A. was also made residuary legatee and sole executor. The money was invested and the income paid to B. for life. B. having no other property, by her will gave all her money and securities for money, furniture, and all other her personal estate and effects, and property, and all her real estate (if any) to her sisters, X. and Y., appointed Y. sole executrix and charged all her property and effects with the payment of her debts and funeral and testamentary expenses. Y. predeceased B., and X. was appointed administratrix of B.'s will. Hall, V.-C. held that the part which lapsed by Y.'s death went to the next-of-kin of B., subject to its proportion of the debts, &c., and not to A., as claiming under the original will. The V.-C. distinguished the case from *Re Davies* (13 Eq. 163), on the ground that in the case before him the testatrix had purported to dispose of real estate, there being none subject to the power, and charged the whole of the property disposed of with debts, thereby showing clearly her intention to treat the whole as her own property. And in *Willoughby-Osborne* v. *Holyoake* (22 Ch. D. 238), a testatrix, having three general powers of appointment over real and personal estate, which was subject to gifts over in default of appointment, made her will which she desired should operate upon all property in which she had any interest or over which

she had any power of appointment or disposition; and thereby after giving various legacies she left and appointed all other property which she had power to dispose of between A., B., and C., and she charged the property with her debts. The will contained a direction that "all my jewellery not mentioned in this my will shall be sold and the proceeds shall fall into my residuary estate," and X. and Y. were appointed executors thereof. A. died in the lifetime of the testatrix; and Fry, J., held that upon the will the testatrix had, by treating all her property as one general lump and subjecting the whole to her debts, evinced the intention of making the appointed property her own, and that the persons claiming in default of appointment had no title to the share which had lapsed by A.'s death; (and see *Att.-Gen.* v. *Brackenbury*, 1 H. & C. 782, *post*, p. 245; and cf. *Re Vizard*, 1 Ch. 588).

When the appointor is a married woman.

It was held by V.-C. Kindersley that different considerations applied to cases where the donee of the power is a married woman. In *Hoare* v. *Osborne* (12 W. R. 661, 33 L. J. Ch. 586), a married woman, donee of a general power of appointment, appointed by will to three trustees on certain trusts, under which the ultimate residuary beneficiaries were the trustees themselves. One of the trustees died before the testatrix; another attested her will. It was held that the gifts to them which lapsed went as in default of appointment. V.-C. Kindersley thought that it was inconsistent to impute to the donee, who was a married woman, an intent to make the appointed property her own, when she could only do so for her husband's benefit: he said that if you imputed to the married woman an intention by means of the first appointment to make the property her own, it was imputing to her an intention so to deal with the property as to render herself perfectly incapable of dealing with any part of it. It is to be observed, however, that it was the married woman's *will* that was to have this effect: she could not deal with the fund after her death, and there seems no impossibility in supposing that a married woman should intend to take property entirely out of settlement, although one result may be that her husband would benefit. *Hoare* v. *Osborne* might perhaps be regarded as

an intermediate case between *Re Davies* and *Wilkinson* v. *Schneider* (9 Eq. 423), for the appointees were both trustees and beneficiaries.

And the V.-C.'s decision has not been followed in *Re De Lusi* (3 L. R. Ir. 232); *Re Pinède* (12 Ch. D. 667); and *Willoughby-Osborne* v *Holyoake* (22 Ch. D. 238). In the last case Fry, J. said that the sound conclusion from such a will of a married woman was that the appointment should operate; but that it should operate as if the property had been the married woman's own property. In that way both the expressed intentions are given effect to, viz., the expression of intention that the property shall be disposed of, and the expression of intention that it shall be treated as if it were her own. This must mean her separate property; (see *Re Roper*, 39 Ch. D. 482, 491, and sect. 4 of the Married Women's Property Act, 1882). The distinction not adopted.

An appointment by deed by the donee of a general power over a fund to his own executors and administrators, gives the absolute interest to himself (*Mackenzie* v. *Mackenzie*, 3 Mac. & G. 559). It follows that an appointment by will to the appointor's executors and administrators, followed by directions which either fail or do not exhaust the fund, makes the appointed fund part of the appointor's assets. If, therefore, the appointment be to executors as executors and if the appointed fund be treated as blended with the appointor's own property, that will afford ground for presuming that the testator intended to make the fund his own for all purposes. If the appointment be to executors as such, the fund becomes part of the appointor's property.

In *Brickenden* v. *Williams* (7 Eq. 310), the donee of a general power gave all her real and personal estate over which she had any disposing power to her executors, and gave several legacies which did not exhaust the fund. V.-C. James held that she meant to make the fund part of her general estate, because she not only gave it to her executors, which he thought almost conclusive, but, having given it to the executors, she proceeded to speak of it as her *property*. She treated everything over which she had any power of testamentary appointment (and which would have included any savings of her separate estate) as one

mass, giving it as one mass to her executors as executors, and constituting it one property, to be dealt with as her will directed.

In *Bristow* v. *Skirrow* (10 Eq. 1), the Master of the Rolls said the result of his own decisions amounted to this: "The donee of a power gives property to his executors: thereupon the executors take it as part of the property of the appointors, and as in that character they do not take it beneficially, they take it in trust, that is, first to pay creditors, and then the legatees, and if there are no legatees, then in trust for the next of kin of the appointor."

In *Chamberlain* v. *Hutchinson* (22 B. 444), the donee of a general power over a fund which was limited over in default of appointment, appointed it to her executor, and charged it with payment of her debts and legacies, and gave half the residue, composed of the appointed fund and her own property, to A., who predeceased her. It was held that the moiety of the fund subject to the power passed to the appointor's next of kin, as part of her estate.

Where trustees to whom appointment made not identical with executors.

The result is the same where the settled property is appointed to trustees who are not identical with the executors, if the appointed property be treated as blended with the appointor's own property (*Lefevre* v. *Freeland*, 24 B. 403).

In *Re Pinède* (12 Ch. D. 667), two funds, amounting to 11,000*l.*, were by settlement vested in A., B., and C. upon such trusts as X., the wife, should by will appoint, and in default upon other trusts. X., having no other property except some H. stock, belonging to her for her separate use, and some savings from her separate estate, made her will, whereby, after reciting that under the settlement the funds were vested in A., B., and C., she, in execution of the power thereby reserved to her, directed them to stand possessed of the funds in trust to pay certain legacies amounting to 6,100*l.* She bequeathed 2,000*l.* to her husband, and also her H. stock, and directed that her funeral and testamentary expenses should be paid "by my trustees out of my said trust property," and that the legacies should be paid free of duty. She gave "all the residue of my personal estate" to Y., and appointed A., B., and

D. executors. Y. predeceased her. It was held by Jessel, M. R., that the testatrix had treated the settled fund as her own, and that such part of it as was undisposed of fell into the residue, and, owing to the death of Y., was to be dealt with as the testatrix's own property and went to her husband.

And the same rule applies to real estate. In *Re Van Hagan* (16 Ch. D. 18), a widow, having a general power of appointment by will over a share of real estate, gave all her real estate, including that over which she had the power, to A., B., and C. in trust for X., who predeceased her, and she appointed A., B., and C. executors. It was held that the testatrix had taken the appointed property out of the settlement, and had made it her own, so that there was a resulting trust for her heir; (and see *Re Horton*, 51 L. T. 420).

Lapse by disclaimer.

The same principles apply in the case of disclaimer as in the case of death. In *Attorney-General* v. *Brackenbury* (1 H. & C. 782) the donee of a general power of appointment by her will directed payment of her debts, and gave legacies, and bequeathed all the residue of her property to A., B., and C., who were the persons entitled in default of appointment, and appointed C., D. and E. executors. If the legatees took under the will, duty would be payable at 5*l.* per cent., if under the gift in default of appointment, at 3*l.* per cent. The head note states the decision to have been, that if the testator has in the first instance charged his residuary estate with payment of debts and legacies, it is not competent for the residuary legatee to disclaim the fund under the appointment, and elect to take under the gift in default. But this is perhaps hardly a correct summary of the judgment. The Court was of opinion that the testatrix had by her appointment made the property her own for all purposes, and that the gift in default of appointment could not take effect.

Lapse of appointments under limited powers.

47. If the power be limited, the donee cannot appoint so as to make the property subject to it his own in case of lapse; in such cases the question is, whether the appointment lapses entirely, or whether there are other words of appointment under which the lapsed share will pass: and in considering this latter alternative it must be remembered that the word "devise," in sect. 26

of the Wills Act, does not include an appointment under a special power (*Holyland* v. *Lewin*, 26 Ch. D. 266, overruling *Freme* v. *Clement*, 18 Ch. D. 499).

The same question may arise in cases of general powers; but it must be remembered that since the Wills Act, a general residuary gift operates as an execution of general powers, and that a residuary gift will carry a lapsed appointment as well as a lapsed legacy.

Appointments in aliquot shares.

If the donee of a power, whether general or limited, appointed to A., B., and C. one-third each of the fund subject to the power, no appointee could under that gift take more than is given to him, viz., one third. So, if there be a definite ascertained sum, subject to a power, and the donee thereof appoint by will one sum, part of the fund, to one person, another sum, other part of the fund, to another person; and "all the rest" or "all the remainder" of the fund to a third, the third appointee cannot claim any share which may lapse in consequence of the death of either of the former appointees in the testator's lifetime, if on the true construction of the appointment all that is intended to be given is a sum arrived at by subtracting the previously named sums from the whole fund. "If a testatrix has power to dispose of a definite sum, *e.g.*, 600*l.*, and says, 'I give 100*l.* to A., 100*l.* to B., and the remaining 400*l.* to C.,' of course the sum of 400*l.* is given just as specifically to C. as the two sums of 100*l.* each are given to A. and B. If, instead of using that language, the testator says 'I give 100*l.* each to A. and B., and the remainder to C.,' without specifying the amount of the remainder, the Court has held, in the absence of anything showing a different intention, that the intention was to give the remainder as a specific sum to C. just as specifically as the property to A. and B." (*per* Kindersley, V.-C., in *Harley* v. *Moon*, 1 Dr. & Sm. 623, approved by Lord Hatherley in *Baker* v. *Farmer*, 3 Ch. at p. 540; and see *Easum* v. *Appleford*, 5 M. & C. 56; *Re Harries*, John. 199; *Lakin* v. *Lakin*, 34 B. 443; *Swete* v. *Tindall*, 31 L. T. 223).

Appointment of fixed sums and residue of a definite sum.

Residue as residue: or fund charged with gifts.

But if the intention is to appoint the residue strictly as residue, or to appoint the entire fund charged with the sums specified in

the preceding appointments, then the residuary clause will be read as an appointment, not of the mere balance of the fund after the sums previously appointed have been deducted from it, but of the entire fund subject to the appointments previously made, the Court acting on the manifest intention of the testator to dispose of the entire fund over which he has a power of appointment (*Re Harries*, *ibid.*).

The same rules apply, whether the appointment fail by the death of the appointee, or by reason of his being a stranger to the power (*Falkner* v. *Butler*, Ambl. 514). "I do not think that there is any sound distinction between cases of lapsed and cases of invalid disposition, whether the disposition be under a power of appointment, special or general, or in exercise of ownership" (*per* Hall, V.-C., in *Champney* v. *Davy*, 11 Ch. D. at p. 958). The word "special" appears to have been inserted by the V.-C. *per incuriam* (see *Holyland* v. *Lewin*, 26 Ch. D. 266). In that case, which arose on the 33rd sect. of the Act, Lord Selborne distinguishes between general and special powers in relation to lapse, and points out that "an appointment under a limited power operates by virtue of the instrument creating the power, the execution when valid being read into and deriving its force from that instrument. If the execution of the power must or may be by will, it must be a will duly executed and attested as such according to law; and the word 'will' in the statute extends to such a testamentary appointment. But that condition being complied with, the execution operates in the same way after the death of the appointor as if the instrument were not testamentary." This overrules *Freme* v. *Clement* (18 Ch. D. 499).

Cases where lapsed appointment did not pass.

In *Easum* v. *Appleford* (5 M. & C. 56), the donee of a general power appointed that a fund of 3,000*l.* should be transferred to trustees, on trust as to 2,700*l.* for his mother, as to 250*l.* for another person, and as to the residue on certain other trusts. This residuary appointment, it was held, could not pass the 2,700*l.* which lapsed by the death of the appointee in the testatrix's lifetime. The Lord Chancellor said: "Had the whole fund been 900*l.*, and 300*l.* of it had been given to the first

legatee, and 300*l.* to the second, and the 300*l.* which will remain, after paying those two legacies thereout, to the third, no question could have arisen: and wherein is the difference?"

In *Ratcliffe* v. *Hampson* (1 Jur. N. S. 1104), a testator, having power to appoint real estate among children, with a gift over to all the children in default of appointment, devised the estates upon trust for sale and declared the trusts of the proceeds in equal sixth shares—there being six children of his marriage—as to one-sixth part in trust to pay to A. (a son) 150*l.*, to B. (a son-in-law) 120*l.*, and to C. (another son) 30*l.*, "and as to the residue of the said one-sixth share" upon trust for a daughter D. for her separate use for life, and after her death to stand possessed of "the share to which she should become entitled during her life as aforesaid, of and in the said trust moneys, stocks, funds, and securities, and the interest, dividends, and annual income thereof," in trust for D.'s children. As to all the remaining sixths he gave them in trust for all his other children by his then wife, and the child or children of any then deceased or who might die in the testator's lifetime. One of the other children, X., died in testator's lifetime leaving a son. It was held by V.-C. Stuart that the 120*l.* appointed to B. was an invalid appointment as being to a stranger, and went as in default of appointment, not into the residue of D.'s one-sixth, and that X.'s one-sixth did not go to her son, but went as in default of apppointment.

In *Re Jeaffreson* (2 Eq. 276), the donee of a limited power appointed 100*l.*, part of the fund subject to the power, to a stranger, and appointed the balance of the fund, after payment of legacies, to objects of the power, which balance amounted to 260*l.*, to pay her own debts: and "should any surplus remain" she gave it to A., an object of the power. The 100*l.* appointment failed; it was held that it did not pass to A. under the gift of the surplus; (and see *Wilkinson* v. *Schneider*, 9 Eq. 423).

Cases in which lapsed appointments passed. Residue as residue.

In *Oke* v. *Heath* (1 Ves. sen. 135), a testatrix had a power of appointment among her kin: she appointed the whole fund to her nephew, and "all the rest and residue of what she had power to dispose of" to her niece. The nephew died in the

testatrix's lifetime, and the fund passed to the niece. It was as if she had said in so many words, "If anything which I have given by my will fails, I mean to sweep into this residuary bequest all that may so fail"; (see *Re Harries*, John. 205, and *Falkner* v. *Butler*, Ambl. 514).

In *Re Hunt* (31 Ch. D. 308), testatrix having a power by will to appoint a fund among her children, appointed three-fourths to her children A., B., and C., and the remaining fourth to her grandson; and "all the rest residue and remainder of my personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, and over which I have any power of disposal by this my will" testatrix gave to B. and C. equally. The appointment to the grandson being in excess of the power failed, and the share appointed passed under the appointment of residue; (and see *Re Crawshay*, 43 Ch. D. 615; *Re Meredith*, 3 Ch. D. 757; *Duguid* v. *Fraser*, 31 Ch. D. 449).

In *Champney* v. *Davy* (11 Ch. D. 949), a testatrix bequeathed personal estate to trustees upon trust for A. for life, and after her death as to 2,000*l.* part thereof, upon trust for certain charitable purposes, and "as to the residue thereof" upon the trusts declared of the proceeds of her real estate, and gave the residue of her personal estate to A., and all her real estate to trustees in trust for sale, and she declared that the proceeds "and the residue of the said trust moneys, stocks, funds, and securities" should be held in trust for the children of B. equally. Part of the personal estate given to the trustees consisted of impure personalty, and it was held that so much of the 2,000*l.* as failed by reason thereof belonged to the legatees of the particular residue and not to A. as general residuary legatee; (and see *Re Tunno*, 45 Ch. D. 66).

Entire sum charged with particular gifts.

In *Carter* v. *Taggart* (16 Sim. 423), a testatrix (whose will was dated before the Wills Act) had a general power of appointing a sum of 10,000*l.* Consols: she appointed thus, "Now I do give and bequeath the said 10,000*l.* Consols in manner following, that is to say, I give to A. 500*l.* sterling; I give to my executors 600*l.* Consols on trust to pay the dividends to B. during her life, and after her decease, the said 600*l.* to sink into the

residue of my estate; I give and bequeath to C., his executors and administrators, all the rest and residue of the said 10,000*l.* Consols after deducting therefrom the legacies above mentioned." A. died in the testator's lifetime: it was held that his 500*l.* passed to C. under the residuary gift; (and see *Re Harries*, John. 199, where the power was special).

How lapse may be excluded.

As the donee of a general power can appoint to whom he pleases, he can of course exclude lapse by appointing to the executors and administrators of the appointee as persons to take in substitution for him; but in order to exclude lapse, the intention to do so must be clearly expressed, and the persons to take in substitution must be definitely pointed out: mere words of limitation will not do (*Browne* v. *Hope*, 14 Eq. 343). This could not be done in the case of a limited power, as the executors and administrators of an object would be strangers to the power (*Maddison* v. *Andrew*, 1 Ves. sen. 57; *Butcher* v. *Butcher*, 1 V. & B. 79).

48. The question of abatement depends on much the same principles as those applicable to lapse.

Abatement when aliquot shares.

Where a fund is appointed by one and the same instrument in aliquot shares, if it prove insufficient, the shares will abate proportionately: so, too, if the donee of a power mistake the amount of the fund and appoint more than the full amount in specific sums, *e.g.*, if he have power to appoint 1,000*l.*, and he appoint 800*l.* to A. and 400*l.* to B. by the same instrument, the appointees must abate rateably (*Laurie* v. *Clutton*, 15 B. 65). In that case the Master of the Rolls said that the testatrix believed she had power to dispose of 19,900*l.* Consols; she had, in fact, only a power of appointing 10,000*l.* She appointed 9,900*l.* to A. and 10,000*l.* to B.; that sum was therefore to be divided between them in the proportion of 99 to 100.

When specific sums are appointed.

Residue.

The appointment of specific sums and the residue of an ascertained fund may or may not be an appointment of the residue specifically according to the expressions used; but to make the residue specific the fund must be ascertained (*Petre* v. *Petre*, 14 B. 197; *Re Currie*, 36 W. R. 752).

When specific.

If there is a definite fund, subject to a power of appointment

by will, and a will purporting to be made in exercise of that power, and appointing one sum, part of the fund, to one person, and another sum, another part of it, to another, and "all the rest" or "all the remainder" of the fund to a third, this last appointment is read as an express specific appointment of the residue of the fund: *e.g.*, if the fund be 3,000*l.*, and 1,000*l.* be appointed to A. and 1,000*l.* to B. and the rest to C., that is read as an appointment to C. of 1,000*l.* (*Page* v. *Leapingwell*, 18 Ves. 463). C. could take no more than 1,000*l.*, although both A. and B. died in the testator's lifetime and the appointments to them lapsed (*Easum* v. *Appleford*, 5 M. & C. 56); although Sir William Grant, in *Page* v. *Leapingwell*, seems to have thought that it might be otherwise. If, therefore, there is a deficiency in such a case, all the three will abate rateably (*Elwes* v. *Causton*, 30 B. 554; and see *Walpole* v. *Apthorp*, 4 Eq. 37; *Haynes* v. *Haynes*, 3 D. M. & G. 590).

In *Booth* v. *Alington* (6 D. M. & G. 613), there was an appointment of 30,000*l.*, "part of" a sum of 120,000*l.*, over which the testatrix had a power of appointment given her by another testator; there was no appointment of the residue of the 120,000*l.* or any part thereof, and the estate did not enable the payment of the 120,000*l.* in full. It was held that the intention was to appoint 30,000*l.* at all events, and that the expression "part of" merely referred to the fund out of which it was to be paid.

Abatement of charge in proportion to deficiency of estate charged.

And if the intention be clear, the amount of a charge for portions on an estate covenanted to be bought for a certain sum, may abate if the full amount be not forthcoming to be expended on the purchase of the estate to be charged.

In *Chambers* v. *Chambers* (Mos. 333), a father on his son's marriage covenanted to lay out 6,000*l.* in the purchase of lands, to be settled in strict settlement, charged with 2,000*l.* for the portions of younger children, or 3,000*l.* for daughters if there were no sons, and further covenanted to settle his own estate on his son and the heirs male of his body. The money was subscribed into the South Sea Company and was reduced to 3,000*l.* Lord King held that the eldest son was not to bear the loss, but

that the younger children should abate in proportion. He read the covenant as one to invest a sum in a particular manner, and that the fund, being so invested, two-thirds should belong to the eldest son and his issue and one-third to the other children.

In *Miller* v. *Huddlestone* (6 Eq. 65), a testator gave his wife a power of appointment over 5,000*l.*: she appointed this sum to trustees on certain trusts, subject to a power of appointing the same to the amount or value of 1,000*l.*, therein given to two of her nieces: the power was to appoint any part of the said trust-moneys (not exceeding 1,000*l.*) as the donee should think fit; and the trustees were to stand possessed of the trust-fund (subject to the payment of the respective sums thereinbefore mentioned, not exceeding 1,000*l.* each) for A. and B. The husband's estate was inadequate to produce the 5,000*l.* V.-C. Malins held that the intention was that the power of appointment should extend to one-fifth of the whole fund, whatever that fund might amount to; and he held that the sums subject to the nieces' powers of appointment must abate rateably.

When the residue bears the loss.

But if the intention is to appoint a specific sum and a residue strictly as residue, or to appoint the entire fund charged with the specific sum, then in case of deficiency the residue must bear the loss.

So, too, if the appointment is not made so as to operate on a fund of unvarying amount, or if the appointor does not assume that a given sum or an estate of a given value will be available, the residuary appointment must bear the loss (*Petre* v. *Petre*, 14 B. 197; *De Lisle* v. *Hodges*, 22 W. R. 363; 17 Eq. 440).

Appointments by separate instruments.

If there be successive independent appointments by separate instruments, which in the aggregate more than exhaust the fund, the latest appointment must bear the loss (*Trollope* v. *Routledge*, 1 De G. & Sm. 662; *Stokes* v. *Bridgman*, 47 L. J. Ch. 759; *Wilson* v. *Kenrick*, 31 Ch. D. 658; *Gilbert* v. *Whitfield*, 52 L. J. Ch. 210). But if the appointments were all made by one instrument which at once takes effect as to all the objects, if the whole fund is given to several objects, one of whom is necessarily named last, the last-named cannot be made to bear the loss merely because he is mentioned last (*Bulteel* v.

Plummer, 6 Ch. 160), although of course the appointor may prefer one appointee if he chooses, but he must express his intention clearly, and the onus lies on the person seeking to establish priority (*Miller* v. *Huddlestone*, 3 M. & G. 513).

Where an appointment is made to take effect out of a trust fund generally, and afterwards an appointment is made of a specific portion of the trust fund, the portion of the fund not specifically appointed must be first applied in satisfaction of the first appointment, and the specifically appointed portion is only to be resorted to in the event of a deficiency (*Morgan* v. *Gronow*, 16 Eq. 1).

Who profits by lapse.

In the ordinary case of a testator who gives legacies to a greater amount than his estate will meet, if any of such legacies lapse, the others benefit by getting paid in full, or at any rate to a greater extent. And as a general rule the case is the same if the donee of a power of appointment over a fund, which was limited over in default of appointment, appoints it by one instrument in such sums as to exceed its limits: if one appointment lapses, the others gain.

In *Eales* v. *Drake* (1 Ch. D. 217), A. had a special power to appoint 7,000*l.* He appointed 10,000*l.* under a mistake as to the extent of his power, and one of the appointees died in his lifetime. The M. R. held that the fund was thereby augmented exactly in the same way as if the testator had given pecuniary legacies of greater amount than his whole personal estate, and then one of the legatees had died, in which case the personal estate would have been augmented for the benefit of the other legatees; and that the appointees in the case before him were in the same position; (and see *Re Lyne*, 8 Eq. 482).

The case of *Barry* v. *Barry* (10 I. R. Eq. 397), seems to some extent to be the converse of *Eales* v. *Drake*. In that case, B. had a non-exclusive power of appointing by deed or will the moneys secured by a policy on his own life. B. made his will, reciting the power and that the amount then secured by the policy was 1,522*l.* 11*s.* 10*d.*, and proceeded to appoint to three of his children 5*s.* each, and to others sums amounting to 1,500*l.* exactly, thus leaving a residue unappointed. There was one object of the power to whom nothing was expressly appointed.

B. retained the policy in his own hands and name, and raised money on it, so that 636*l.* 10*s.* 2*d.* only was available for the appointees at his death. The M. R. seems to have thought the appointments good because they were good at the date of the will: *sed qu.* The exact order made does not appear from the report, but it is submitted that the case might be supported as one of general abatement, treating the unappointed residue as a specific sum, entitled to rank equally with the appointed funds, and not as a true residue at all.

Costs of action relating to appointed and unappointed funds.

The general rule applied in the administration of estates that the costs should come out of the residue, is not applied to the case of appointments. The costs of an action relating to an appointed fund are borne rateably by the appointed and unappointed funds, and not wholly by the unappointed (*Warren* v. *Postlethwaite*, 2 Coll. 116; *Trollope* v. *Routledge*, 1 De G. & S. 662; *Moore* v. *Dixon*, 15 Ch. D. 566), in the absence of a direction to the contrary in the will, as in *Davies* v. *Fowler* (16 Eq. 308). So, in *Re Lambert* (39 Ch. D. 626), the probate duty and costs of probate were apportioned between the appointed and the unappointed funds; and see *Deane* v. *Croft*, (1892) 1 Ch. 652; but in *Re Wilson*, 26 W. R. 848, the costs of probate were thrown on the fund which passed by the appointment, and not on separate property of the appointor, a married woman, which was undisposed of; and see *Re Bourne*, (1893) 1 Ch. 188.

Appointed property assets for payment of debts.

49. Both real and personal estate, subject to general powers of appointment, become assets for the payment of the appointor's debts, if the power is actually exercised in favour of volunteers; and it makes no difference whether the power is exercisable by deed or by will, or by will only (*Jenney* v. *Andrews*, 6 Madd. 264; *Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Williams* v. *Lomas*, 16 B. 1).

It is not the possession of the power, but the exercise of it, which gives occasion to the application of the principle: the instrument by which it is executed is therefore unimportant.

"The rules of the Court are established, so far as they can, in favour of just creditors, and to prevent persons having powers from disposing thereof voluntarily to defeat creditors. On that ground was *Shirley* v. *Lord Ferrers* (7 Ves. 503 *n*), which has been allowed ever since, and is agreeable to *Lascelles* v. *Lord Cornwallis* (2 Vern. 465). A distinction was endeavoured, that the appointment by Lord Ferrers was by will, this by deed; because whoever takes by will takes as a legacy. But that is not a material distinction, for, if established, the justice intended by the Court in these cases would be avoided in every instance, as then it would be putting it barely on the form of the conveyance, and elude the rule of justice. Nor is there any substantial ground for this distinction; for if there is a power to execute by will or deed, though executed by will, it operates not as a will to that purpose, but as an appointment; not as an appointment of his own assets, but of the estate of another, and takes not place by force of the will; it is therefore a slight and shadow of distinction only" (*per* L. C. Hardwicke, *Townshend* v. *Windham*, 2 Ves. sen. 1, 10).

Voluntary conveyances.

The rule as to voluntary conveyances is there stated to be that they are void not only as against subsequent purchasers (under 27 Eliz. c. 4), but also as against creditors (under 13 Eliz. c. 5), if the settlor was indebted at the time of making such conveyance. But if he were not indebted at the time, it will be good against subsequent creditors. "On that foundation the Courts have grounded their opinion in the execution of powers, when they stop *in transitu*, as it is called, and say it shall not be given away from creditors" (*Ibid;* and see *Bayspoole* v. *Collins*, 6 Ch. 228; *Crossley* v. *Elworthy*, 12 Eq. 158; *Mackay* v. *Douglas*, 14 Eq. 106).

The power must be executed.

In order to make the fund assets for the payment of debts, the power must be actually exercised (*Holmes* v. *Coghill*, 12 Ves. 206). It is impossible, so long as the distinction between property and power exists, to make a fund subject to a power which has never been executed, assets for the payment of the debts of the donee of the power. The persons to whom the fund is given in default of appointment, have at least an equal equity with the donee's creditors. It rests with the donee whether he will

execute the power or not; but if he has once done so, he will be considered to have exercised his right to intercept the devolution of the property on the remainder-man, and equity will interpose to give the property, if appointed to volunteers, to his creditors. Lord Eldon in this case thought that even a defective execution would be sufficient (but see as to this, *post*, "Defective Execution," s. 7). But where trustees had advanced to the tenant for life during her life a large portion of the trust funds, and the tenant for life who had a general power of appointment appointed the funds by will to her trustees, in trust to indemnify themselves, and subject thereto for beneficiaries, and died insolvent, it was held that the creditors could not compel the trustees to replace the fund (*Re Newnham*, W. N. (1881), 69).

It is sufficient, however, if the donee of a general power by his will directs payment of his debts without more, and appoints an executor, the fund subject to the power will be liable to supply the deficiency of his own assets to pay his debts (*Re Davies*, 13 Eq. 163). And it would be the same although no executor were appointed (*Laing* v. *Cowan*, 24 B. 112). But the appointment of executor without more is not such an execution of the power as to make the fund assets (*Re Davies*, 13 Eq. 163; *Re Thurston*, 32 Ch. D. 508).

Do appointments by married women make the property appointed assets for payment of their debts?

50. There has been considerable conflict of authority as to property over which married women have a general power of appointment. A married woman in respect of her separate estate is considered as a feme sole; it is clear, therefore, both on principle and authority, that not only the bonds, bills, and promissory notes of married women, but also their general engagements, may affect their separate estates, except as the Statute of Frauds may interfere, where the separate property is real estate (*Tullett* v. *Armstrong*, 4 B. 319).

What is a general engagement?

But the term "general engagement" is an ambiguous and misleading one. If it is meant merely to say that goods sold to a married woman in the ordinary course of domestic life, that contracts expressed to be made by her in respect of property not her separate estate, *e. g.*, for buying, or selling, or letting, or hiring a house do not necessarily impose a liability to be satisfied out of the separate estate which she may happen to have, in that sense and to that extent, the proposition that her separate estate

is not liable to her general engagements is quite accurate. But it would be very inconvenient that a married woman with a large separate property should not be able to employ a solicitor, or a builder, or tradesman, or hire labourers or servants, and very unjust that, if she did, they should have no remedy against such separate property (L. R. 4 P. C. 594; and see *Skinner* v. *Todd*, 30 W. R. 267).

What separate estate liable to general engagements before and since M.W.P. Act, 1882.

But prior to the Married Women's Property Act, 1882, the general engagements of a married woman could only be enforced against so much of the separate estate to which she was entitled, free from any restraint on anticipation, at the time when the engagements were entered into, as remained at the time when judgment was recovered (*Pike* v. *Fitzgibbon*, 17 Ch. D. 454), and since that Act, it is still necessary to show that the married woman had free separate property at the date of the contract (*Palliser* v. *Gurney*, 19 Q. B. D. 519; *post*, p. 265).

Appointment by will, how far assets for payment of debts of married woman.

It is not easy to reconcile the cases which have decided that property, appointed by a married woman's will under a general power of appointment by deed or will, is assets for payment of her general engagements with the principle enunciated in *Pike* v. *Fitzgibbon*.

Limitations which amount to an absolute interest.

In *London Chartered Bank, &c.* v. *Lemprière* (L. R. 4 P. C. 572), the Privy Council held that a gift to a married woman for her separate use for life, with remainder as she shall by deed or will notwithstanding coverture appoint, with remainder to her executors and administrators, is equivalent to an absolute gift to the sole and separate use of the lady. Such a form of gift to a married woman without any restraint on anticipation, vests, in equity, the entire corpus in her for all purposes as fully as a similar gift to a man would vest it in him. Consequently an appointment by will by a married woman in such a case makes the fund liable to her general engagements. But this case apparently rested on the remainder to the executors and administrators of the married woman, and the limitation was held equivalent to absolute property (see *ibid.*, p. 595). And the same remark applies to *Mayd* v. *Field*, 3 Ch. D. 587. So, in *Johnson* v. *Gallagher* (3 De G. F. & J. 494), the property

was limited to such persons as the married woman should appoint, and in default to herself for her separate use; (it is of course immaterial whether the estate precedes the power or the power the estate, 3 Ch. D. at p. 593). In *Hulme* v. *Tenant* (1 Bro. C. C. 16), the limitation in default of appointment was as to the realty to the heirs and assigns, and as to the personalty to the executors and administrators of the married woman. In *Field* v. *Sowle* (4 Russ. 112), the remainder in default of appointment is not stated: and it is to be observed that the only decree was for satisfaction out of the rents and profits of the property to which the married woman was entitled for her separate use for life without any restraint on anticipation. In *Hulme* v. *Tenant*, *supra*, the L. C. said that he could not make the married woman exercise her power. The case of the *Duke of Bolton* v. *Williams* (4 Bro. C. C. 297), was not a case of a power at all. In *Owens* v. *Dickenson* (Cr. & Ph. 48), the decision was merely that, although in strictness a married woman cannot contract debts, yet if, by will in execution of a power, she directs payment of her debts, her general engagements are intended by this term. In *Heatley* v. *Thomas* (15 Ves. 596), the power was testamentary only, and the limitation in default was to the statutory next of kin. In *Stead* v. *Clay* (4 Russ. 550), the L. C., at p. 556, certainly treats the property which a married woman had appointed by her will under a general power as her property and subject to the payment of all debts to which she was liable. In *Hughes* v. *Wells* (9 Ha. 749, at p. 773), V.-C. Turner says: "I see no reason why, the wife having been constituted a *feme sole* by the terms of the settlement, her assets, *including the trust funds which have become her assets by the exercise of the power*, should not be bound to the same extent as the assets of any other person, not under the disability of coverture, would under the same circumstances be bound." This is merely a dictum, and it does not appear whether the V.-C. intended to refer to all cases of appointments or only to such as were prior to the general engagements. The same learned judge, when L. J., in *Johnson* v. *Gallagher* (3 De G. F. & J. 494, 517), divides the cases on the subject

into three heads—(i.) Where the power of appointment is general, by deed, or writing, or will; (ii.) Where it is by will only, and the power has been exercised; (iii.) Where there is a limitation to third persons in default of appointment, and the power has not been exercised.

In this last case, the debts and engagements of the married woman cannot prevail against the title of the persons entitled in default of appointment. It can make no difference whether a man or a married woman be the donee of the power if it be not exercised.

When the power is by deed or will, the corpus is liable.

Where the power of appointment is exercisable by deed or by will, the Lord Justice sums up the law on the subject thus (p. 518) "In this case the Courts have certainly held the corpus of the property to be subject to the debts and engagements of the married woman (*Allen* v. *Papworth*, 1 Ves. sen. 163; *Hulme* v. *Tenant*, 1 Bro. C. C. 16; *Heatley* v. *Thomas*, 16 Ves. 596); although it is to be observed that during the life of the married woman, the Court has never gone further than to affect the limited interest (*Hulme* v. *Tenant; Field* v. *Sowle*, 4 Russ. 112). There has been much question on what grounds the Court has thus subjected the corpus of the property to the debts. In most, if not all, of these cases, the liability of the corpus has been put upon the ground that the instruments by which the debt was created or secured, operated as executions of the power of appointment;* but it seems clear that such instruments cannot operate as appointments in the strict sense of the term. They do not take effect according to their priorities. They create no lien or charge (*Hulme* v. *Tenant; Duke of Bolton* v. *Williams*, 4 Bro. C. C. 297; *Owens* v. *Dickenson*, Cr. & Ph. 48). Lord Cottenham in the last of these cases, after giving his opinion that transactions of this description have no resemblance to the execution of powers, has said that what they are it is not easy to define, and no doubt there is much difficulty in defining them. Perhaps the nearest approach to a definition of them may be, that they are transactions which create a debt payable

But only to extent of life interest during the married woman's life.

* This was one of the grounds of the decision in *London Chartered Bank* v. *Lempriere*, L. R. 4 P. C. 572, at p. 590.

out of the separate estate, and out of that estate only, and which in that sense, but in that sense only, have the character of appointments; and this perhaps is what Sir John Leach may have meant in *Field* v. *Sowle*, where he speaks of the Court acting on the security of the wife, not as an agreement to charge her separate property, but as an equitable appointment." He then proceeds to give other reasons for considering the doctrine of appointment exploded, and asks how then do they operate? "I think the answer is to be found in *Hulme* v. *Tenant*. When a man contracts debts, both his person and his property are by law liable to the payment of them. A Court of Equity having created the separate estate, has enabled married women to contract debts in respect of it. Her person cannot be made liable either at law or in equity, but in equity her property may. This Court therefore, as I conceive, gives execution against the property, just as a Court of Law gives execution against the property of other debtors. *Hulme* v. *Tenant* seems to have proceeded on this ground, and Lord Eldon seems to have considered it to be the right ground, for in *Nantes* v. *Corrock* (9 Ves. 182) we find him refusing to enforce the claim of a creditor against the separate estate, on the ground that it consisted of stock, which could not be taken in execution at law. In my opinion, this is the true footing on which these cases stand. It is to be considered, then, what are the consequences which result? A legal debtor may alien his property before it is bound by judgment or execution. Why may not a married woman do the same as to her separate property? Her creditors are not appointees of the property. They have no charge or lien upon it. She may contract other debts, and all her creditors will be paid *pari passu* (*Anon.*, 18 Ves. 258). She may thus exhaust the fund by contracting fresh debts. Why may she not mortgage or alienate it? There is no instance, so far as I am aware, of this Court having restrained her from doing so; nor, so far as I can see, any principle on which such a restraint could be imposed. I think, therefore, her power of alienation remains, notwithstanding any debts which she may have contracted. A Court of Equity will indeed, as it seems,

enforce the right which she has created against her separate estate, after the determination of the coverture, or after her death (*Field* v. *Sowle*; *Nail* v. *Punter*, 4 Sim. 474). But in so doing it proceeds, as I apprehend, upon this principle—that having created the right as a *feme sole*, she cannot, when she has actually become so, be permitted to disturb it."

Criticism of distinction between first and second class of cases under L. J. Turner's classification.

But it is difficult to see how the Court can give such equitable execution as is mentioned by the Lord Justice against any property to which the married woman was not entitled at the date of the contract; and the reasoning of Kay, J., in *Re Roper* (39 Ch. D. 482), appears as applicable to the case of a power to appoint by deed or will as to that of a power to appoint by will only. The existence of the power to appoint by deed, unexercised at the date of the contract of the married woman, cannot, it is submitted, make any difference, so long as the distinction between property and power is as well settled as it is at present (*Ex p. Gilchrist*, 17 Q. B. D. 521). If the estate over which the power extends cannot be made available for the general engagements of the married woman in bankruptcy, in cases where she can be made bankrupt (as it cannot according to *Ex p. Gilchrist*), it is difficult to see how it can be made available in the administration of her estate after death, in cases where the power has been executed after the general engagements have been entered into. And in *Shattock* v. *Shattock* (2 Eq. 182), Romilly, M. R., held that property appointed by the will of a married woman who had a general power of appointment by deed or will was not assets for payment of her debts; (and see *Adamson* v. *Hammond*, L. R. 3 P. & D. 141; *Re Hastings*, 35 Ch. D. 94).

In *Vaughan* v. *Vanderstegen* (2 Drew. 165), the Vice-Chancellor, after pointing out the distinction between property in which a married woman had a separate estate, and a power vested in her, held that the exercise of a power of appointment by will did not make the property applicable to the payment of her engagements in the nature of debts—viz., of such engagements as would be charges on her separate estate. He showed that the execution of a power by will over a reversionary interest expectant upon the appointor's death could not make the property appointed her separate estate: and if not, it could not be

applied in payment of her debts or engagements in the nature of debts, to the payment of which nothing is applicable but separate estate. But on further consideration, in *Vaughan* v. *Vanderstegen* (2 Drew. 363), the Vice-Chancellor held that, fraud having been practised by the married woman, the creditors were entitled to the appointed fund. He in fact held that the *fraud* made the appointed estate part of the general assets of the married woman. On this the Privy Council remark (L. R. 4 P. C. 596): "It is not easy to see on what principle the fraud could alter the nature of the property subject to appointment, or affect the appointees. It is easy to see how fraud might make that a debt, to which the married woman would be in equity liable, notwithstanding her coverture, and that, there being such a liability or debt, equity would deal with any property to which she was, notwithstanding coverture, absolutely entitled, and any property over which she had a general power of appointment, exactly as it would do in the case of a man or *feme sole* dying indebted. Given the relation of debtor and creditor in equity, all the consequences of such relation would appear to follow, just as if there were no coverture in the case."

In *Hobday* v. *Peters* (2) (28 B. 354), the M. R. says (p. 358), "If a general power of appointment is expressly given to a married woman over any property or any interest in property, such property or interest does not thereby become settled to her separate use, nor does it become so by her exercising her power."

In *Outram* v. *Hyde* (24 W. R. 268), where a married woman had a life interest in real estate (apparently not settled to her separate use) with a power to appoint it by will: V.-C. Hall said, "There is no authority that such a power vested in a married woman makes the subject matter assets for payment of her debts."

Result of authorities independently of M. W. P. Act, 1882.

As the authorities stand at present, and apart from the Married Women's Property Act, 1882, it is impossible to say that the law is settled. It is submitted that the real question is not whether the power is exerciseable by deed or will, or by will only, but whether the married woman has or has not exercised it prior to incurring the liabilities sought to be enforced against

the appointed property. The following propositions are suggested as the result of the balance of the authorities, although they do not reconcile all the authorities.

(i.) Where at the date when the liability was incurred the property stood limited to the married woman for her life for her separate use, and in default of appointment by her to her heirs, or her executors or administrators (as the case may be), it is applicable to discharge the liability. If the right depends on the limitation in default, this should be the case, whether the power has been exercised or not, and whether the power is exerciseable by deed or will, or by will only. But it is not easy to see what the limitation in default can add, unless it be to her separate use.

(ii.) Where the property is limited in default of appointment to third persons, it is applicable only if the power has been so exercised as to make it the separate estate of the appointor, and only to discharge such liabilities as come into existence while the appointed fund remains in the hands of the trustees of the settlement or of the married woman. The creditor has no equity to restrain the married woman from parting with her separate property, before he has obtained a charge on it by judgment (*Robinson* v. *Pickering*, 16 Ch. D. 660).

It will be observed that this proposition excludes all cases where the married woman has appointed by will: and to this extent it is not consistent with some of the cases referred to above.

(iii.) It is competent to a married woman in exercise of her power to charge the appointed property with payment of her debts; and this term will include all her general engagements (*Owens* v. *Dickenson*, Cr. & Ph. 48). And this charge may be created by a general direction to pay debts, followed by an appointment of the property, as in the case of a man (*Re De Burgh Lawson*, 41 Ch. D. 568). And it has been held that when a married woman made a will in execution of a general power, and appointed her husband and others executors, but did not create any charge of debts or funeral and testamentary expenses, and her estate was insolvent, her funeral expenses were payable out of the appointed property (*Re MacMyn, Lighbown* v. *MacMyn*, 33 Ch. D. 575).

(iv.) The analogy of the Statute of Limitations applies to such so-called debts (*Re Hastings*, 35 Ch. D. 94).

M. W. P. Act, 1882.

51. It is now enacted by the Married Women's Property Act, 1882:

Sect. 1, sub-sect. 2.

"A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Sect. 1, sub-sect. 3.

"Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to, and to bind her separate property, unless the contrary be shown."

Sect. 1, sub-sect. 4.

"Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire."

Sect. 4.

"The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this Act."

Effect of sect. 1, sub-sect. 3.

The effect of these sections is to abrogate the rule enunciated in *Pike* v. *Fitzgibbon* (17 Ch. D. 454), and to remove the difficulties suggested above in all cases where the Act applies. See *Cox* v. *Bennett*, (1891) 1 Ch. 617.

Limited application of the Act.

But (i.) the Act does not apply to the contracts of a married woman entered into before the Act (*Conolan* v. *Leyland*, 27 Ch. D. 632; *Turnbull* v. *Forman*, 15 Q. B. D. 234). And the exercise of a general power of appointment by will does not make the appointed property assets for the discharge of such engagements (*Re Roper*, 39 Ch. D. 482); unless they are ante-nuptial contracts (*Re Parkin*, (1892) 3 Ch. 510).

Nor (ii.) does the Act apply, unless the plaintiff can prove that the married woman had free separate property at the date of the contract sought to be enforced (*Re Shakespear*, 30 Ch. D. 169; *Palliser* v. *Gurney*, 19 Q. B. D. 519; *Stogdon* v. *Lee*, (1891) 1 Q. B. 661). These cases were decided under sect. 1; but, having regard to the concluding words of sect. 4, the same result would appear to follow with respect to property appointed by will, which is only made liable in the same manner as the married woman's separate estate is made liable under the Act. If she had no free separate estate at the date of the contract, then her separate property is not made liable under the Act, and her appointed property is therefore not made liable. The applicability of the Act is obviously restricted to a considerable extent by these decisions, as the married woman in a large number of cases has a restricted life interest only with a power of appointment.

It is not necessary, however, that the married woman should have free assets at the date of the judgment in order that judgment may be recovered against her, at any rate, where her liability arises, not under contract, but out of an equity affecting her (*Whittaker* v. *Kershaw*, 45 Ch. D. 320; and see *Cox* v. *Bennett*, (1891) 1 Ch. 617).

When married woman may be made bankrupt.

By sect. 1, sub-sect. 5, of the Married Women's Property Act, 1882, it is enacted, "Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws in the same way as if she were a *feme sole*." Prior to this Act, a married woman was not subject to the bankruptcy laws, although she had separate estate, unless she was trading in the City of London (*Ex parte Jones*, *Re Grissell*, 12 Ch. D. 484). And the same rule still applies unless she is trading separately from her husband (*Re Gardiner*, *Ex parte Coulson*, 20 Q. B. D. 249). And if she is made a bankrupt, her separate life estate, which she is not restrained from anticipating, vests in her trustee, although such estate arises under her marriage settlement, notwithstanding the 19th section of the Act (*Re Armstrong*, *Ex parte Boyd*, 21 Q. B. D. 264). But she cannot be compelled to execute a general power of appointment (*Ex parte Gilchrist*, *Re Armstrong*, 17 Q. B. D. 521).

Where a man has both a power and an interest.

52. If a man has both a power and an interest, and does an act generally as owner of the land without reference to the power, the land shall pass by virtue of his ownership, not of his power (*Clere's case*, 6 Co. Rep. 17).

But where the disposition will be absolutely void if it do not enure as an execution of the power, effect will be given to it by that construction (*ibid*). Thus, if a married woman, having a power and an estate in default of appointment, devises the estate, the disposition will operate as an execution of the power, because otherwise it would fail altogether (*Roscommon* v. *Fowke*, 6 Bro. P. C. 158; Sug. Pow. 347). On the same principle, where a man has both a power and an interest, and he creates an estate which will not have an effectual continuance in point of time if it be fed out of his interest, it shall take effect by force of the power (*ibid*).

If he both grant his estate and exercise his power, the estate shall pass in the manner best adapted to carry out the intention of the parties (*Cox* v. *Chamberlain*, 4 Ves. 631).

In that case lands were limited to such uses as A. should appoint, and in default of appointment to him in fee. A., by lease and release, in pursuance of all powers vested in him, granted, bargained, sold, aliened, remised, released and confirmed, limited, declared and appointed the estate to trustees to uses. If the deed operated as a grant, the title was good; if as an appointment, bad. Lord Alvanley said that it would be monstrous to hold that, where there is a power and an interest, and the act being equivocal, it is doubtful whether the donee thereof acted under the one or the other, the Court should adopt that which would defeat the instrument, and he accordingly held the appointment nugatory. This has been applied to a lease, which could have been, but was not, granted under the Settled Land Act (*Mogridge* v. *Clapp*, (1892) 3 Ch. 382).

Lord St. Leonards (Pow. 357) points out that this did not decide that where there is first a formal appointment, and then

a release or grant of the estate, the instrument shall, in favour of the intention, be held to operate simply as a release or grant. But he considers it the better opinion that it would so operate. However, in *Roach* v. *Wadham* (6 East, 289), an estate was conveyed to A. and his heirs to such uses as B. should appoint, and in default of appointment to the use of B. and his heirs. By this deed a perpetual rent was reserved to the vendors, and B. covenanted for the payment of it. Afterwards, A., by B.'s direction, bargained, sold, and released, and B. granted, &c., and also appointed the premises and all his estate therein, to C. and D. and their heirs, to hold to them their heirs and assigns as tenants in common, subject to the rent. There were covenants in the deed by C. and D. to pay the rent, but D. did not execute it. The Court held that the deed operated as an execution of the power, and not as a grant of the interest, and that consequently C. was not liable in an action of covenant for non-payment of the rent, inasmuch as he claimed by a title paramount to the estate of B.; (see this case observed on, Sug. Pow. 359, where it is said that the intention of the parties is the only true test of the method in which the deed is to operate, and that on this principle the conveyance to C. and D. ought to have been held to operate as a conveyance and not as a mere exercise of the power). The doctrine of *Roach* v. *Wadham* has been stated not to be a favourite in Courts of Equity (*Child* v. *Douglas*, 2 Jur. N. S. 950; and see *Spoor* v. *Green*, L. R. 9 Ex. 99).

If he either grant his estate or exercise his power, and full effect will not be thereby given to the intention of the parties, the estate shall be held to pass in the manner not expressed to be intended in order to effectuate the general intention (*Tomlinson* v. *Dighton*, 1 P. W. 149; *Campbell* v. *Leach*, Ambl. 740; *Doe* d. *Daniel* v. *Keir*, 4 M. & R. 101; *Wade* v. *Paget*, 1 Bro. C. C. 363; explained, Sug. Pow. 348).

And parol evidence is not admissible to show an intention not to exercise the power (*Blake* v. *Marnell*, 2 B. & B. 35).

So, if a man have a power of revocation and new appointment over an estate, and he grant the estate to new uses without reference to his power, this will operate as an exercise of his power (Sug. Pow. 346). So, where the donees of a power, after reciting the power, and that the premises thereinafter mentioned and intended to be appointed had been conveyed to uses, "limited and appointed," not only the lands subject to the power, but also other lands of their own, the words were held to operate as a grant (*Macandrew* v. *Gallagher*, 8 I. R. Eq. 490; and see *Shove* v. *Pincke*, 5 T. R. 124, 310).

Appointor's estate shall make good the deficiency of the appointed estate.

If the power be executed, but prove to have been previously destroyed, or to have been in its inception badly created, the donee's interest shall make good the default in appointment.

In *Manderville* v. *Roe* (1 J. & L. 371), estates were limited after the death of husband and wife to trustees for a term, and subject thereto to the husband in fee; the trusts of the term were, in case the wife should die in the lifetime of the husband, leaving children living at her decease, to raise 8,000*l.* for portions for the children, to be divided between them as the husband should appoint. The wife did not die in her husband's lifetime; but he made his will, reciting the power, and purporting to execute it. L. C. Sugden held that he could not correct the settlement, or hold that the contingency on which the charge was to arise, was unimportant. But he held that the testator had perfect ability to give that which he assumed to give, not by virtue of the power, but by force of that which came in lieu of the power. The power was intended to be operative in one of two events; in the other event, the estate was vested in the husband, and supplied the place of the power; (and see *Cross* v. *Hudson*, 3 Bro. C. C. 30; *Mortlock* v. *Buller*, 10 Ves. 292, 315.) "I never heard it as a point to be maintained, that because a man shows an intention to execute a power which he has not,

the interest which he had in the estate should not bear out the disposition he thinks proper to make of a charge on that estate" (*per* Lord Thurlow, *Cross* v. *Hudson*, 3 Bro. C. C. 30). In that case, the testator had at his death no power at all, and the will must have operated on his estate or have been wholly nugatory. But it would make no difference whether he had no power at all, or a power which he imperfectly executed. In *Sing* v. *Leslie* (2 H. & M. 68), the testator's primary intention was to execute his power, but, at the same time, there was an equally marked intention to charge the estates; and the question was, whether the plain intent of the testator, to which he had the means of giving effect out of his reversionary interest, and which he certainly wished to effectuate, was to be defeated because the testator imagined that his will could operate by way of execution of the power. The Court carried the intention into effect. *Jones* v. *Southall* (30 B. 187; 30 L. J. Ch. 875) is to the same effect.

Reservation of powers of revocation.

53. Powers of revocation and new appointment may be reserved *toties quoties* by instruments executing a power, although such reservation be not expressly authorized by the instrument creating the power (Sug. Pow. 387).

And where the power of appointment is to two or the survivor, the power of revocation may be reserved to the survivor. In *Brudenell* v. *Elwes* (1 East, 442; 7 Ves. 382), a power of appointment among children, to be executed by husband and wife jointly or by the survivor of them, with or without power of revocation, was executed by both, reserving a power of revocation to the survivor. The execution of the latter power by the survivor was held valid, and this was followed in *Dixon* v. *Pyner* (34 W. R. 528; 55 L. J. Ch. 566; 54 L. T. 748).

But the principle of these cases does not extend to make valid a power of revocation reserved on a joint appointment to one of the joint donees of the power during their joint lives. In *Burnaby* v. *Baillie* (42 Ch. D. 282), a fund was settled upon trust,

after the death of the husband and wife, for the issue of the marriage as they should by deed, with or without power of revocation and new appointment, jointly appoint; and in default of such appointment, as the survivor should by deed or will appoint; and in default of appointment, if there should be only one child of the marriage (which happened), then as to one moiety of the fund in trust for that only child, and as to the other moiety in trust for the husband. On the 11th May, 1887, the husband and wife irrevocably appointed that, subject to their own prior interests, one moiety of the fund should be held in trust for R., the only child of the marriage, absolutely, if and when she should attain twenty-one or marry; and by the same deed they appointed the other moiety to R. in the same way, but subject to a power of revocation and new appointment reserved to the husband alone. A week later, by another deed, the wife released her life interest in the fund, and also all power of appointment over the fund; and on the 30th November, 1887, the husband by deed-poll revoked the appointment of the second moiety to R., to the intent that that moiety might devolve as if it had been unappointed, but subject to any appointment to be thereafter made by him. It was held that the reservation in the deed of 11th May, 1887, of a power of revocation to the husband alone was invalid, on the ground that it was an attempt to delegate to one the power given to both.

It makes no difference whether the power is simply collateral, appendant, or in gross: it is well settled that those who can make an absolute appointment can also make a qualified one (Sug. Pow. 389).

If the power be limited—*e. g.*, to appoint among the children of A.—the donee cannot of course alter the objects by appointing to the children and reserving a power of revocation and new appointment to whom he pleases. But the formalities to accompany the revocation and new appointment need not be the same as those which were made requisite to the original execution (Sug. Pow. 367). It is conceived that a limited power, exerciseable with the consent of A., could not be exercised, reserving a power of revocation and new appointment without such consent.

Creator of powers may exclude power of revocation.

The creator of the power may shew that it was his intention that a power of revocation should not be reserved, or that such a power should be exerciseable only during a limited period. "Suppose the instrument creating the power had fixed the day when it must be executed, it seems impossible to doubt that revocation would have been excluded, because there could be nothing more contrary to the constitution of the power than such an execution of it. In like manner, I should have no doubt that, if a power is directed to be executed on or before a given day, a clause of revocation may be inserted, but then it can only enable the new appointment under it to be made on or before the given day" (*per* Lord Brougham, in *Piper* v. *Piper*, 3 M. & K. 166: and see *Cooper* v. *Martin*, 3 Ch. 47).

Power of revocation must be reserved by the instrument which is to be revoked.

54. A power, once executed, cannot be revoked, unless a power of revocation be reserved by the instrument executing the power, although the instrument creating the power authorizes revocation expressly.

The rule applies whether the property subject to the power be real or personal (Sug. Pow. 390). This was expressly decided in *Worrall* v. *Jacob* (3 Mer. 256), and it made no difference that the appointor had retained the deed in her own custody; and the mere attempt to vary the dispositions could not of itself prove that the omission of a power of revocation was occasioned by fraud or mistake. In *Hele* v. *Bond* (Sug. Pow. 908, Ch. Pre. 474), A. made a settlement reserving power by deed to revoke it, and by the same deed or any other, from time to time to limit new uses. A. revoked the settlement and limited new uses, but reserved no further power to himself: it was held that he could not, by virtue of the first power, limit any other uses. The principle of this decision—namely, that an instrument *executing* a power must expressly reserve any powers which may be intended to be retained—is an express authority for the rule above stated, which is indeed an illustration of the general

principle that a deed once executed cannot be revoked, unless it reserves a power of revocation. Thus, where a voluntary settlor, who had reserved to himself no power of revocation, made a will by which he revoked all other wills, settlements, and agreements for settlements theretofore made, it was held that the will was not intended to exercise a power which did not exist, and so to deal with property over which the testator had no disposing power; and that therefore no question of election was raised (*Booker* v. *Booker*, 34 W. R. 346). The only exception to this is that class of cases of which *Chadwick* v. *Doleman* (2 Vern. 528) is the first, by which appointments made to a younger child who afterwards becomes an eldest son are revoked, as having been made on a tacit condition. The power to revoke the old uses which was understood to be implied in a power to appoint new trustees of a strict settlement, might perhaps be regarded as another exception to the rule (cf. *Bishop of Oxford* v. *Leighton*, 2 Vern. 376). But whether or not such a power of revocation was in fact implied—and it is not clear that any authority ever so expressly decided—the point has long since ceased to be of practical interest (see Sug. Pow. 884; 3 Dav. Conv. 629 *et seq.*, 3rd ed.).

Reservation of powers of new appointment.

55. The same principle applies to cases where powers of new appointment, and not merely of revocation, purport to be reserved. A power of revocation in an *original* settlement authorizes of itself a limitation of new uses (Sug. Pow. 371). But a power of revocation in a deed *executing* a power will not of itself authorize a new appointment. "Though no man can have a power of revocation unless he expressly reserves it, no man can want a power of limitation unless he excludes himself from it" (*per* Lord Nottingham in *Witham* v. *Bland*, 3 Sw. 277 n.).

The rules regulating the effect of successive executions of powers upon the original powers and uses in a settlement, where new powers have been reserved upon every occasion, are laid down in *Saunders* v. *Evans*, 8 H. L. C. 721, 6 D. M. & G. 654. These rules do not of course apply to powers which are executed by will: for a will is by its nature always revocable (*Lisle* v. *Lisle*, 1 Bro. C. C. 533; *Lawrence* v. *Wallis*, 2 *ib.* 319).

Successive executions of primary powers.

If there is an original power of appointment, and then an execution of that power, reserving a power only to revoke, followed by a revocation, the original power remains unaffected. And if in the first instrument executing the original power there is reserved a power of revocation and new appointment, such instrument does not constitute a new settlement destructive of the first, nor is the original power thereby exhausted and at an end, but upon the revocation of such instrument remains in full force. If there is a power of appointment to be exercised by deed or will, and the first instrument executing the power is a deed which contains the reservation of a power to revoke and to appoint anew by deed, and then there is a simple revocation of this instrument, the original power on such revocation being in full force, there may be a valid execution of it by will as well as by deed.

In *Saunders* v. *Evans*, an estate in land was settled in 1794 to the use of two persons successively for life, with remainder to such uses as A. (one of the life tenants) should by any deed, with or without power of revocation, attested by two or more witnesses, or by will attested by three witnesses, from time to time and as often as she should think fit, appoint. In 1830, A. exercised the power by deed, reserving a power of revocation and new appointment by *deed*. In 1833, a deed revoking that of 1830, and newly appointing and also reserving power to revoke and appoint anew by *deed*, was executed. This course was exactly repeated in 1835 by a deed of that date. In 1836, A. executed another deed, simply revoking that of 1835. In 1848, by a will reciting the power of 1794, A. declared the uses of the estate. It was held that the deed of 1830 had not exhausted the power of 1794 and substituted a new power for it to be executed only by deed, and that consequently on the revocation in 1836

of the last preceding deed, the power of 1794 was capable of being exercised by A. either by deed or by will.

In *Montagu* v. *Kater* (8 Ex. 507), there was a limitation to the husband and wife for life, and then to their children as they should jointly appoint with or without power of revocation and new appointment, and in default of joint appointment, as the survivor should by deed or will appoint. The husband and wife appointed to a son in fee, reserving a joint power of revocation and new appointment: they afterwards revoked this, but made no new appointment. The husband survived his wife, and by his will again appointed the estate to the son in fee. This was held valid. The judges said, "By the execution of the joint power the estate was limited to the defendant in fee. The revocation of that appointment, also jointly made, revived the original power of joint appointment, and with it the dependent power of appointment by the survivor in case of default;" (and see *Sheffield* v. *Von Donop*, 7 Ha. 42).

Where the power revoked is not a primary power.

The power in *Saunders* v. *Evans* was what Lord St. Leonards calls a primary power—*i.e.*, the lands were settled to such uses as A. should appoint, and in default, over. A different question would arise if the power were not primary—*i.e.*, if the lands were settled to uses with a power to A. to revoke and limit anew.

In such a case, if the power of revocation and new appointment were executed, and then that second appointment revoked without more, the uses of the original settlement would not be revived. L. J. Turner, in *Evans* v. *Saunders* (6 D. M. & G. 678), says, that in that case the revocation by the last deed of the last deed but one did not operate to revive the uses limited by the last deed but two. He thought that each revocation was absolute, and that there was no proper analogy between that case and the case of a repealing statute restoring other statutes which had been abrogated by the statutes repealed. In such cases, the revival of the original statutes takes place by virtue of the repeal; but in a case like *Evans* v. *Saunders*, the question must be governed by intention, but only by intention as shown by the operation of the deeds (8 H. L. C. 741). And this is probably what is meant by Lord Nottingham in the third proposition stated by him in

Witham v. *Bland*, 3 Sw. 277, n. "Where a power of revocation is reserved to a stranger, he has no power of limitation unless reserved: *secus ubi* the feoffor himself has power to revoke."

In *Ward* v. *Lenthall* (1 Siderf. 343, cited 6 D. M. & G. 673), there was a settlement with power to revoke and limit new uses; then there was a revocation with a limitation of new uses and with power to revoke, but with no power to limit new uses; and then there was a revocation of the uses limited by the first appointment with a limitation of new uses. Here, then, the exercise of the power of revocation by the first appointment wholly destroyed the uses created by the settlement. The exercise by the second appointment of the power of revocation reserved by the first appointment destroyed the uses created by that first appointment, but did not affect the revocation of the original uses which had been made by the first appointment, and the consequence was that there were no subsisting uses; the fee resulted to the settlor discharged of all the uses. The settlor in that case was the donee of the power: the result would be the same if the donee were not the settlor—*e.g.*, if lands were settled by a father on a son and his issue, with a power of revocation and new appointment to the son, and this power was executed reserving a power of revocation; if that revocation were exercised, the lands would, it seems, result to the father.

Payment by trustees without notice of appointment.

Trustees are often required to hand over trust funds, which are subject to a power of appointment, on the assumption that no appointment has been made: and if they have no notice of any appointment, and no reason to believe that any such appointment has been made, they will not be justified in paying the money into Court under the Trustee Relief Act (*Re Cull*, 20 Eq. 561): and will be safe in paying it over to the persons entitled in default of appointment (*ibid.* explaining *Re Wylly*, 28 B. 458; and see Lewin, 345, 8th ed.).

Effect of appointment on estates limited in default of appointment.

56. The existence of a power of appointment does not prevent the vesting of the property subject to the power in the persons entitled in default of appointment, until the power be exercised, whether such power precede or follow the limitation or gift in default, and whether it be exerciseable by deed or by

will (*Cunningham* v. *Moody*, 1 Ves. sen. 174; *Doe* v. *Martin*, 4 T. R. 39, 65; *Heron* v. *Stokes*, 2 Dr. & War. 89; Fearne, Cont. Rem. 226). Recent decisions have thrown some doubt on the effect of an appointment on the estates limited in default. But it is submitted that the true rule, in accordance with principle, and the balance of authority is as follows:—

> The exercise of a power of appointment divests (either wholly or partially according to the terms of the appointment) the estates limited in default of appointment and creates new estates, and that, too, whether the property be real or personal.

The dicta of Lords Hardwicke, Kenyon, and St. Leonards in the cases above referred to are in accordance with this, although the point actually decided in those cases was that the existence of the power did not prevent the vesting of the estates in default. And in *Walker* v. *Armstrong* (21 Beav. 284), Lord Romilly held, that it was well settled law that an appointment under a power, which merely relimits the old estates, creates new estates, although given to the same persons and for the same purposes and affecting the same piece of land. The decree in this suit was varied on appeal on other grounds (8 D. M. & G. 531). But in subsequent cases it appears to have been considered that the rule is different if a person entitled in default of appointment takes under an appointment the same quantum of estate as he would have taken in default of appointment, at any rate in the case of personalty.

In *Re Vizard* (1 Ch. 588), a fund was settled by will on trust for A. for life with remainder for all or such one or more of the children or issue of B. as A. should appoint, and in default of appointment for the children of B. equally. One of B.'s children assigned all his property to a trustee for his creditors by a deed under the Bankruptcy Act of 1861, duly registered. A. afterwards appointed the fund by will to the children of B. equally. All the children of B. living at the testator's death survived A., so that the appointees took the same shares under the appointment that they would have taken in default of ap-

pointment. It was held by V.-C. Stuart (1 Eq. 667), that although the interest taken by the appointee under the appointment was identical with that which he would have taken in default of appointment, the appointed interest was a new estate and did not pass by the deed. In the Court of Appeal L. J. Turner rested his affirmance of the decree on the fact that the interest of the appointee was altered by the execution of the power; for under the instrument creating the power he took a vested interest: but his interest under the testamentary appointment was liable to lapse. L. J. Knight Bruce expressed no opinion. In *Lee* v. *Olding* (25 L. J. Ch. 580; 2 Jur. N. S. 850), A. was at the date of his bankruptcy the sole object of a power exercisable by B. over a fund in which B. had a life interest, and to a moiety of which he was also entitled in default of appointment. Two days after A. obtained his certificate, B. appointed the whole fund to him. V.-C. Stuart held that B. and not his assignees in bankruptcy were entitled to the fund. In *De Serre* v. *Clark* (18 Eq. 588), A. by his will gave his residuary estate to trustees on trust to pay the income to B. for her life, and after her death to pay the trust funds to such of the children of B. as should be living at her death in such shares as B. should appoint, and in default of appointment to such children equally. B. had four children who survived her. One of them, C., married in 1851 a domiciled Frenchman. He died in 1857 leaving one child. In 1870 B. appointed under the power a specific sum to C. for her separate use. The question was whether C. was entitled to the whole fund; or whether under the French law of community, her child was not entitled to one moiety, being the share to which C.'s husband would have been entitled if living. V.-C. Malins held that the fund was not acquired during coverture but at the date of the appointment, and was therefore not subject to the law of community.

On the other hand in *Re Frowd's Settlement* (4 N. R. 54), a settlement of personalty contained a power of appointment among the children, grandchildren, and issue of the marriage as the survivor of the husband and wife should by will appoint and in default for the children of the marriage equally. There

was one child only; she married in 1851, and by her settlement covenanted to settle all property then vested in her or to which she or her husband in her right might become entitled during coverture. The husband died in 1861 leaving his wife and two children. In 1863 the funds comprised in the first settlement were duly appointed to the only child. V.-C. Wood said that at the time of the marriage the child was entitled to a vested interest, liable to be divested by an appointment wholly or partially to the grandchildren. The appointment had been made and had rendered certain that which was before uncertain, but had taken nothing away. The property was therefore subject to the covenant: and he distinguished the older authorities as relating to real estate.

In *Sweetapple* v. *Horlock* (11 Ch. D. 745), the M. R. reviewed the authorities and held that, where real estate, which stood limited, subject to appointment, to the use of A. and B. equally in fee was appointed under the power to A. and B. equally, the appointees took new estates: he dissented from the decision in *Re Frowd* (p. 751), and pointed out the fallacy of the distinction relied on by the L. J. Turner in *Re Vizard* (p. 752). And it is clear that although the appointment is to be read into the instrument creating the power as part of that instrument, it is not to be so read in as to relate back in point of time to the creation of the power (*Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 61, 78).

The foregoing cases must of course be distinguished from those before referred to (p. 22), where the donee of a power is precluded either wholly or in part from exercising his power on the ground that he would thereby derogate from his own grant (and see *Re Sprague*, *Miley* v. *Cape*, 43 L. T. 236).

Probate duty.

57. Under 55 Geo. 3, c. 184, probate duty attached only to the actual property of the deceased, and was therefore not payable in respect of property over which the testator had a mere power of appointment (*Platt* v. *Routh*, 3 B. 257, affirmed *sub nom. Drake* v. *Attorney-General*, 10 Cl. & F. 257; but see *Palmer* v. *Whitmore*, 5 Sim. 178; Sug. Pow. 204). But now, by 23 Vict. c. 15, s. 4, it is provided that the stamp duties pay-

able by law upon probates of wills and letters of administration with a will annexed, in England and Ireland, and upon inventories in Scotland, shall be levied and paid in respect of all the personal or moveable estate and effects which any person dying after the 3rd April, 1860, shall have disposed of by will under any authority enabling such person to dispose of the same, as he or she shall think fit.

Legacy duty.

The Legacy Duty Act, 36 Geo. 3, c. 52, s. 7, provides that any gift by any will or testamentary instrument of any person dying after the passing of the Act, which shall by virtue of such will or testamentary instrument have effect or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy within the intent and meaning of the Act, whether the same shall be given by way of annuity or in any other form, and whether the same shall be charged only on such personal estate, or charged also on the real estate of the testator or testatrix who shall give the same: except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given.

The power must be a general one. The effect of this section is to prevent the operation of the ordinary rule of law (according to which, whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift), and to render any property which is appointed by will in pursuance of a general power for that purpose chargeable with duty as a legacy under that will, whether the power was created by deed (as in *Re Cholmondeley*, 1 Cr. & M. 149), or by a previous will (as in *Platt* v. *Routh*, 3 B. 257). In the case of a power created by will, if the donee of the power is also the donee of any limited interest in the property, the effect of s. 18, *post*, of the last-mentioned Act is to supplement the provisions of s. 7, by making the property appointed chargeable upon the exercise of the power with duty as a legacy to the

donee of the power under the original will, in addition to the duty with which it becomes chargeable as a legacy to his appointees under his own will (Hanson on the Legacy and Succession Duty Acts, 88, 3rd ed.).

What is a general power for the purposes of the Act.

For the purposes of the Legacy Duty Act, a power to appoint to such persons, other than J. W. and his relations, M. H. and his relations, and the relations of the donee's late husband, as she should choose, has been held to be a general power (*Platt* v. *Routh*, 3 B. 257, *sub nom. Drake* v. *Attorney-General*, 10 Cl. & F. 257). And the power is considered absolute, although it is exercisable by will only (*Attorney-General* v. *Brackenbury*, 1 H. & C. 782). Where a marriage settlement in the usual form gave successive life interests to wife and husband with the usual trust for the children of the marriage, and in default of children for such persons as the wife should appoint, and the wife appointed by deed in 1848, and survived her husband and died in 1888 without having had a child; it was held that the appointed property passed under the marriage settlement to the appointee within the meaning of 44 & 45 Vict. c. 12, s. 38, and that the settlement and appointment were "a voluntary settlement" within 52 & 53 Vict. c. 7, s. 11 (*Attorney-General* v. *Chapman*, 1891, 2 Q. B. 526).

Limited power.

Where the power is a limited one, the execution thereof is referred to the instrument creating it, and legacy duty is or is not payable accordingly, without reference to the instrument by which the power is executed. Thus, where one of several partners under a power in the partnership articles appointed a share to a son, it was held that the partnership articles were a voluntary settlement within the same Act (*Attorney-General* v. *Gosling*, 40 W. R. 366; 1892, 1 Q. B. 545).

The question by whom probate duty or account duty, as the case may be, should be borne, is one of intention on the construction of the appointment in each case. Thus in *Davies* v. *Fowler* (16 Eq. 308), V.-C. Malins held that the words "testamentary expenses" threw the probate duty on a particular fund. In *Re Croft*, *Deane* v. *Croft* (66 L. T. 157; 1892, 1 Ch. 652), where the donee of a limited power appointed various sums to

different objects of the power and the residue to another, Kekewich, J., held that the account duty was payable out of the whole fund and not out of the residue only; (and see *ante*, p. 254; *Re Bourne*, 1893, 1 Ch. 188).

Legacies subject to powers.

As to legacies subjected to powers of appointment, it is provided by 36 Geo. 3, c. 52, s. 18, that where any legacy, or the residue or any part of the residue of any personal estate shall be subjected to any power of appointment to or for the benefit of any person or persons specially named or described as objects of such power, such property shall be charged with duty as property given to different persons in succession; and in so charging such duty, not only the person and persons who shall take previous and subject to such power of appointment, but also any person and persons who shall take under or in default of any such appointment, when and as they shall so take respectively, shall in respect of their several interests, whether previous or subject to or under or in default of such appointment, be charged with the same duty, and in the same manner, as if the same interests had been given to him, her, or them respectively in or by the will or testamentary disposition containing such power, in the same order and course of succession as shall take place under and by virtue of such power of appointment, or in default of execution thereof, as the case may happen to be: and where any property shall be given for any limited interest, and a general and absolute power of appointment shall also be given to every person or persons to whom the property would not belong in default of such appointment, such property upon the execution of such power shall be charged with the same duty and in the same manner as if the same property had been immediately given to the person or persons having and executing such power, after allowing any duty before paid in respect thereof: and where any property shall be given with any such general power of appointment, which property in default of appointment will belong to the person or persons to whom such power shall also be given, such property shall be charged with and shall pay the duty by the Act imposed, in the same manner as if such property had been given to such person or persons absolutely in the first instance, without such power of appointment.

Succession duty.

58. By 16 & 17 Vict. c. 51, s. 4, it is provided, that where any person shall have a general power of appointment under any disposition of property taking effect upon the death of any person dying after the 19th May, 1853, over property, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power: and where any person shall have a limited power of appointment under a disposition taking effect upon any such death over property, any person taking any property by the exercise of such power shall be deemed to take the same as a succession derived from the person creating the power as predecessor (*Earl of Zetland* v. *Lord Advocate*, 3 Ap. Ca. 505, 516). The power must take effect upon a death after the Act; in such a case the duty will attach, although the power may have been exercised before the Act (*Re Lovelace*, 4 D. & J. 340; and see Hanson, 255).

The first branch of the above section relating to a general power applies only to a general power possessed by one person enabling him to dispose of property as an absolute owner, which is the equivalent of property, and does not touch the case of a joint power of appointment given by a family settlement to two donees (*Charlton* v. *Att.-Gen.*, 4 Ap. Ca. 427). The latter case falls within the second section of the Act, which in substance enacts that any disposition of property by reason whereof any person shall become beneficially entitled to any property on the death of any person, shall be deemed to confer on the person entitled by reason of such disposition a succession; and the term "successor" shall denote the person so entitled, and the term "predecessor" shall denote the settlor or other person from whom the interest of the successor is derived. Under this section, the succession created by a general power is to be referred to the instrument creating the power, and not to that which exercises it, as the disposition by reason whereof the succession takes effect: and the appointees derive their succession from the donor of the power as "predecessor," and not

from the donees (*Att.-Gen.* v. *Floyer*, 9 H. L. C. 477; *Lord Braybrooke* v. *Att.-Gen.*, *ibid.* 150). In the cases of family re-settlements creating a joint power, the donor of the power for the purpose of ascertaining the "predecessor," is the person out of whose estate of inheritance the power is derived; (see the last cited cases, and *Charlton* v. *Att.-Gen.*, 4 Ap. Ca. 427).

Succession duty not to prevent execution of powers of sale, &c.

Sect. 42 makes the duty a first charge upon the property, but provides that where any settled real property comprised in a succession shall be subject to any power of sale, exchange, or partition exercisable with the consent of the successor, or by the successor with the consent of another person, he shall not be disqualified by the charge of duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be; and in such case the duty shall be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest also in all moneys arising from the exercise of any such power, and in all investments of such moneys.

This section has been held to extend to a case where lands were settled subject to an existing jointure, and the donees of a power of sale contained in the settlement sold with the jointress's consent. It was contended that s. 42 applied only to sales under powers which overrode the charge in respect of which the succession would arise, but the L. C. Hatherley thought otherwise (*Dugdale* v. *Meadows*, 6 Ch. 501). But it is understood that the Crown does not recognise the correctness of this decision (see 17 Ch. D. 712).

It was held in *Re Warner's S. E.* (17 Ch. D. 711), that a sale under the Settled Estates Act, 1877, discharges the land sold and shifts the duty to the purchase-money. The ground of this decision was that such a sale by virtue of the twenty-second section takes effect as if there had been in the settlement a power exercisable so as to operate by way of revocation of the

old and re-appointment of the new uses. It has not at present been decided whether a sale under the Settled Land Act has the same effect as to succession duty, as a sale under the Settled Estates Act was held to have (see s. 20). It is stated in Hood & Challis on the Act (p. 219, 3rd ed.), that the above decision covers the case of a sale under the Settled Land Act (and see 2 Dart, V. & P. 669, 6th ed.); but the point has not yet been decided.

CHAPTER VI.

EXCESSIVE EXECUTION.

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1. Excess in the execution of powers consists in the transgression either of the rules of law or of the scope of the power.

Perpetuities.

2. The rules against perpetuities apply to instruments executing powers as well as to other instruments (Lewis on Perpetuity, 482). The rules are:—(1) the old common law rule against double possibilities which prevents a limitation of a legal estate in land to the unborn child of an unborn child of an existing person (see *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 *ib.* 85); (2) the later rule which has been rendered necessary by the creation of executory limitations: viz., that an executory estate or interest must vest, if at all, within the period of a life or lives in being and twenty-one years after, with a further period for gestation if gestation actually exists (see Williams, R. P. 318, 12th ed.; Challis, R. P. 146 *et seq.*). It is not enough that the executory estate or interest may, or even that in the event it does, vest within that period, if it is possible that it may not do so: the possibility of its exceeding the limit allowed by law renders the whole estate or interest void *ab initio*.

Particular power.

There is an important distinction between general and particular powers in this respect. The donee of a general power is virtually absolute owner of the property over which his power extends; and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him. The donee of a particular power is not absolute owner: he cannot create any estate in point of perpetuity which might not have been created by the instrument containing the power: he cannot appoint to any person to whom the original creator of the power could not have appointed.

Test of validity of estates appointed.

"The test of the validity of the estates raised is to place them in the deed creating the power in lieu of the power itself" (Sug. Pow. 395-6). It was held in one case (*Re Powell's Trusts*, 39 L. J. Ch. 188; 18 W. R. 228), that a life interest given to a married woman, followed by a general power of appointment by will, is not equivalent to giving her an immediate general power so as to take the case out of the rule against perpetuities; and James, V.-C. there held that an appointment which would have been good, if the donee's power had been a general one, was void, inasmuch as the donee's power was testamentary only and

preceded by a life interest in the donee, and that the appointment must therefore be read into the instrument creating the power. This case, however, stands alone, and has been dissented from by Chitty, J., and North, J. (see *Rous* v. *Jackson*, 29 Ch. D. 521; *Re Flower*, 55 L. J. Ch. 200; 34 W. R. 149; and in Ireland, *Stuart* v. *Babington*, 27 L. R. Ir. 551). And on principle it is submitted that for the purposes of the rule against perpetuities a general power to appoint by will, following a life interest in the donee of the power,—whether the donee be a man or a married woman,—is equivalent to absolute ownership.

Distinction between particular powers created by deed and by will.

Inasmuch as wills do not come into operation until the death of the testator, there is an important distinction between powers *created* by deed and by will: a deed speaks from its own date, and subsequent events cannot affect the validity of limitations then contained in it: and a voidable deed, if subsequently confirmed, speaks from its own date for this purpose (*Cooke* v. *Cooke*, 38 Ch. D. 202).

But a will speaks from the death of the testator: and thus, limitations, which were bad when the will was made, may prove good when it comes into operation. In *Peard* v. *Kekewich* (15 B. 166), there was a devise in trust for A. for life, with remainder to any of his children as he should appoint. At the date of the will A. had no child, but at the death of the testator he had a son, B., three years old. A., by will, appointed to trustees and their heirs in trust for B. and his heirs, and to be conveyed to him at twenty-three, with a gift over to other sons if B. died under twenty-one; and he directed the rents to be accumulated until B. or such other sons should attain twenty-three, and then to pay them over. It was held that the gift was not too remote, and that the direction to accumulate was valid. In this case, the appointment to the son and the direction to accumulate until he attained twenty-three were considered as distinct and separable from the appointments over to the other sons and the directions to accumulate affecting their interests if they arose; for B. was the only son born during the lifetime of the creator of the power; the trusts for accumulation, therefore,

so far as they affected the other children of A., were void, as transgressing the laws against perpetuity; (and see *Duke of Devonshire* v. *Lord G. Cavendish*, 4 T. R. 741, n.; *Wilkinson* v. *Duncan*, 30 B. 111).

Consequences of rule that appointment must be read into instrument creating power.

3. The rule that the appointment under the power is to be read into the instrument creating the power is followed out to its logical results. Thus, although a husband could not at common law, prior to the Conveyancing Act, 1881 (sect. 50), make a conveyance to his wife, yet he could exercise a power of appointment to take immediate effect in her favour, because the wife's estate arises in such a case not out of the husband's estate, but out of the seisin under the original instrument creating the power. And the same rule applied to an appointment by the wife to her husband (*Daniel* v. *Uply*, Latch. 44; Bendloe, 180; *Lord Antrim* v. *Duke of Buckingham*, 1 Ch. Ca. 17; Freeman, Ch. Ca. 168). So, too, although the prior estate of freehold and the subsequent limitations must be contained in the same instrument in order to let in the rule in *Shelley's case*, yet a limitation to A. for life by deed and a subsequent appointment during A.'s life to the heirs of A. in exercise of a power of appointment contained in the deed creating A.'s life estate, fall within the rule in *Shelley's case* so as to give A. a fee simple, because when the appointment to A.'s heirs is read into the instrument creating the power, both the life estate of A. and the subsequent limitation to his heirs are contained in the same instrument (Fearne, C. R. 74, ch. 1, s. V. 14; *Venables* v. *Morris*, 7 T. R. 342, 438; Sug. 471).

Are powers of maintenance, &c., applicable to an appointed share.

4. It is suggested that powers of maintenance, advancement, &c., may in cases where they are applicable to vested shares, apply to appointed shares under this principle. Mr. Davidson, however (Convey. vol. 3, 3rd. ed., p. 159), considers it the better opinion that the provisions for maintenance, education, and advancement usually inserted in settlements would not in general apply to an appointed share, unless expressly extended thereto as in his Precedents, such a share being by the appointment and so far as it extends, withdrawn from the general operation of the settlement (Sug. Pow. 467; but see Chance,

Pow. vol. 2, p. 483) : although he says that the contrary view appears to have been acted on in *White* v. *Grane*, 18 Beav. 571.

It is submitted that it might well be held that the appointment is to be read as part of the original instrument creating the power and in lieu of the power—so far as any of the other provisions in the instrument are inconsistent with the appointment, they must be taken to be abrogated, but not further. It is in each case a question of intention; if the words of the maintenance and advancement clauses are applicable to a share to which an object is absolutely entitled, as in *White* v. *Grane*, there is no reason why those powers should be taken to have been extinguished by the appointment. The appointed share is not taken out of, but the appointment is read into, the will or settlement. Mr. Davidson further considers it doubtful whether these powers could be delegated without express authority; and he refers to *Chester* v. *Chadwick*, 13 Sim. 102; *White* v. *Grane*, *ubi supra*; and *Lloyd* v. *Lloyd*, 26 B. 96.

Estates created by appointment.

5. But the estates created by the appointment are not necessarily the same estates as would have been created by the same words in the original instrument. Thus where limitations in an appointment if contained in the original settlement could only have been read as contingent remainders, and would have failed as such, it was held that they could be read in the appointment as springing uses, and were good as such (*Hole* v. *Escott*, 4 M. & C. 187, 192).

Appointee's estate does not relate back.

Nor is the rule applicable so as to make the appointee's estate or enjoyment relate back to the date of the instrument creating the power. The appointee's estate though derived from the power vests, not at the time of the creation of the power, but at the time when its execution takes effect (*Duke of Marlborough* v. *Lord Godolphin*, 2 Ves. sen. 61, 78, 79). Nor, since the Wills Act, is it necessary that an appointment by will of real estate under a power created by deed, should contain words of limitation in order to pass the fee (Sug. Pow. 400).

Rules laid down in *Cattlin* v. *Brown*.

6. The rules with reference to perpetuity applicable to gifts by will are analogous to those applicable to appointments under powers.

The rules as to executory devises are thus stated by V.-C. Wood in *Cattlin* v. *Brown*, 11 Ha. 372:—

Gifts must vest within proper period.

(1.) An executory devise is bad unless it is clear, at the death of the testator, that it must of necessity vest in someone, if at all, within a life in being and twenty-one years afterwards (*Dungannon* v. *Smith*, 12 Cl. & F. 546, 570).

Rule of construction.

(2.) You must ascertain the objects of the testator's bounty by construing his will without reference to the rules of law against perpetuities; and having, apart from any consideration of the effect of those rules in supporting or destroying the claim, arrived at the true construction of the will, you are then to apply the rules of law as to perpetuities to the objects so ascertained.

This rule is thus explained and qualified in *Martelli* v. *Holloway* (L. R. 5 H. of L. 532): "There may be a particular clause in a will, which on one construction appears to offend against the law relating to perpetuities, but if it is fairly capable of another construction which avoids that objection, the latter construction will be preferred, especially if it is found to be in accordance with the general intention of the will." So in *Stroud* v. *Norman* (Kay, 313), an appointment, which standing alone would have been bad for perpetuity, was construed by reference to a proviso in the power that it should take effect within twenty-one years after the donee's death; (but see Sug. Pow. 520). But "there is no bias in the mind of the Court upon a question of construction. The sole object is to find out the meaning of the words which are used, and when that is done the legal effect is to be ascertained" (*per* Lord Selborne in *Webb* v. *Sadler*, 8 Ch. 426): "You do not import the law of remoteness into the construction of the instrument by which you investigate the expressed intention of the testator. You take his words, and endeavour to arrive at their meaning, exactly in the same manner as if there had been no such law, and as if the whole intention expressed by the words could lawfully take effect. I do not mean that, in dealing with words which are obscure and ambiguous, weight even in a question of remoteness may not sometimes be given to the consideration that it is better to

effectuate than to destroy the intention: but I do say that if the construction of the words is one about which a Court would have no doubt, if there was no law of remoteness, that construction cannot be altered or wrested to something different for the purpose of escaping from the consequences of that law" (*per* Lord Selborne in *Pearks* v. *Moseley*, 5 Ap. Ca. 719; and see *Re Bevan's Trusts*, 34 Ch. D. 716; *Hale* v. *Hale*, 3 Ch. D. 643; *Bentinck* v. *Duke of Portland*, 7 Ch. D. 693; *Blight* v. *Hartnoll*, 19 Ch. D. 294).

Gift bad *in toto*.

(3.) If the devise be to a single person answering a given description at a time beyond the limits allowed by law, or to a series of single individuals answering a given description, and any one member of the series intended to take may by possibility be a person excluded by the rule as to remoteness, then no person whatever can take, because the testator has expressed his intention to include all, and not to give to one excluding others (*Dungannon* v. *Smith*, 12 Cl. & F. 546).

Gift also bad *in toto*.

(4.) Where the devise is to a class of persons answering a given description, and any member of that class may possibly have to be ascertained at a period exceeding the limits allowed by law, the same consequence follows as in the preceding rule, and for the same reason. You cannot give the whole property to those who are in fact ascertained within the period, and might have taken if the gift had been to them *nominatim*, because they were intended to take in shares to be regulated in amount, augmented, or diminished, according to the number of the other members of the class, and not to take exclusively of those other members; (and see *Smith* v. *Smith*, 5 Ch. 342; *Re Stark*, 21 W. R. 165).

Gift when severable.

(5.) Where there is a gift or devise of a given sum of money or property to each member of a class, and the gift to each is wholly independent of the same or similar gift to every other member of the class, and cannot be augmented or diminished whatever be the number of the other members, then the gift may be good as to those within the limits allowed by law (*Storrs* v. *Benbow*, 2 M. & K. 46; 3 D. M. & G. 390; *Griffith* v. *Pownall*, 13 Sim. 393).

Appointment to one for life, with general power of disposition, good.

7. A power of appointment among children is well executed by an appointment to one of them for life, with power to dispose of the capital by deed or will, whether such children were *in esse* at the creation of the power or not; for this in effect gives the whole beneficial interest to the appointee, and does not transgress any rule against perpetuity (*Bray* v. *Bree*, 2 Cl. & F. 453; *Jebb* v. *Tugwell*, 7 D. M. & G. 663).

And a like appointment to one of the objects of the power for life, with a power of disposition by will only, is good, if such object were *in esse* at the time of the creation of the power (*Phipson* v. *Turner*, 9 Sim. 227; *Stark* v. *Dakyns*, 10 Ch. 35; *Morse* v. *Martin*, 34 Beav. 500).

Secus, if the power of disposition be testamentary only.

But such an appointment will not be good if the object was not *in esse* at such time. In *Wollaston* v. *King* (8 Eq. 165), a testatrix had a power under her marriage settlement to appoint a fund in favour of the children of the marriage: she appointed, in execution of the power, a part of the fund to her son C. for life, with remainder to such persons as he should by *will* appoint. As the effect of this would be to tie up the appointed part of the fund, and render it incapable of disposition during the whole lifetime of C., who was not *in esse* at the time of the creation of the power, this remainder after C.'s life estate was held void.

Power of appointing after marriage.

So an appointment (under a power in a marriage settlement) upon such trusts to take effect after the marriage of a daughter (unborn at the date of the settlement, and then unmarried) as she should by deed or will appoint; and in the meantime on trust for her for life, and after her death as she should by will appoint, was held void as to all except the life interest; for marriage is as uncertain with regard to the time at which it may take place, if it ever does take place, with reference to lives in being, as death is (*Morgan* v. *Gronow*, 16 Eq. 1).

The daughter's execution of her power would of course be invalid also; for no act of hers could make the appointment to her valid.

If, however, the daughter was married at the time of such an appointment, the objection would not apply, and the appointment would be good (*ibid.*).

If a power of appointment among issue be given by a settlement or by a will to a person unmarried at the date of the settlement or of the death of the testator, as the case may be, an appointment to a child for life, and after his death to his eldest son living at his death or born in due time after, is of course void for all beyond the life estate (*D'Abbadie* v. *Bizoin*, 5 I. R. Eq. 205). Appointment to unborn child for life, with remainder to his child.

But "property may be given by will, or secured by settlement, to an unborn person for life, or to several unborn persons successively for life with remainders over, provided the vesting of the remainders or (*qu.* and) the ascertainment of those who are to take in remainder be not postponed till after the death of such unborn person or persons" (*per* Malins, V.-C., in *Stuart* v. *Cockerell*, 7 Eq. at p. 366, citing *Ashley* v. *Ashley*, 6 Sim. 358; Lewis, Perp. 423; 1 Jarm. Wills, 3rd ed. 264; Gilbert, Uses, 269 n.). A life interest may certainly be given to an unborn person, for life simply without any remainder over (Sug. Pow. 411; *Williams* v. *Teale*, 6 Ha. 239, 250); or to a class of unborn persons for life (*Hampton* v. *Holman*, 5 Ch. D. 183, 188; *Re Roberts*, 19 Ch. D. 520; *Gooding* v. *Read*, 4 D. M. & G. 510): and life interests may be given to a number of unborn persons with an absolute gift in remainder to ascertained persons *in esse* (*Evans* v. *Walker*, 3 Ch. D. 211), or necessarily ascertainable within the prescribed period (*Re Hargreaves*, 43 Ch. D. 401); but not to the survivor of the unborn tenants for life absolutely. *Avern* v. *Lloyd* (5 Eq. 383), is overruled by *Re Hargreaves*, *ubi sup.* In *Garland* v. *Brown* (10 L. T. 292), a devise to a class of unborn children for life as tenants in common, with remainder to the survivor in fee was held void for perpetuity as to the remainder.

A forfeiture clause with a gift over to other objects of the power may be effectually created if it is to take effect within the period allowed by the law, but not otherwise. Thus in *Hodgson* v. *Halford* (11 Ch. D. 959), an appointment made under a limited power, created by the will of a testatrix who died before the birth of many of its objects, was made subject to a condition for forfeiture on marriage with a Christian, either before or after the appointor's death; one appointee married a Christian in the Gift over on forfeiture.

lifetime of the appointor, and another after her death: the forfeiture and the gift over consequent thereon were effectual in the former, but not in the latter case. So, in *Webb* v. *Sadler* (8 Ch. 419), a forfeiture on bankruptcy or assignment within the due limits was held good; and a similar provision without any restriction was held void in *Stockbridge* v. *Story*, 19 W. R. 1049.

Limitation to unborn person for life, with remainder to that person's issue, bad.

A limitation of the legal estate in land to an unborn person for life with remainder to that person's issue is void, not because it is obnoxious to the rule against perpetuities, but because it transgresses the old rule of the common law that a possibility cannot be limited upon a possibility; it is therefore immaterial that the ulterior limitation is made to take effect within the period allowed by the rule against perpetuities.

In *Whitby* v. *Mitchell* (42 Ch. D. 494; 44 *ib.* 85), lands were limited by marriage settlement to the use of husband and wife successively for life with remainder after the death of the survivor "to the use of a child, grandchild, or more remote issue, or all and every or any one or more of the children, grandchildren, or more remote issue of" the husband and wife (such child, grandchildren, or more remote issue being born before any appointment should be made) as the husband and wife should appoint. The husband and wife by deed appointed part of the settled lands to the use of a daughter for life for her separate use without power of anticipation, and after her decease to the use of such persons as she should by will appoint, and in default to the use of her children living at the date of the deed. It was held that all the limitations except that to the daughter for life were void.

Appointment not wholly bad, if transgressing part severable.

8. An appointment to a married woman, unborn at the date of the creation of the power, for her separate use with a restraint on anticipation, contravenes the rule against perpetuities so far as the restraint on anticipation is concerned. It was, indeed, suggested by Jessel, M. R., in *Re Ridley, Buckton* v. *Hay* (11 Ch. D. 645), that, as the restraint on alienation annexed to the separate property of married women is a solitary exception to the general rule that all property must be alienable, the exception

might usefully be extended to the rule against perpetuities. But this suggestion has not been adopted.

The imposition of the restraint, however, does not avoid the whole appointment, but is simply void.

Appointment of estate without power of anticipation.

In *Fry* v. *Capper* (Kay, 163), there was a power of appointment among children contained in a marriage settlement; in execution of this, a share of the trust fund was appointed to trustees for the separate use of a married daughter (unborn of course at the date of the settlement) for life without power of anticipation, and after her decease for her general appointees. The appointment was upheld, but the restraint on anticiption was rejected; (see, too, *Whitby* v. *Mitchell*, 42 Ch. D. 494; 44 *ib.* 85; *Re Teague*, 10 Eq. 564; *Re Cunynghame*, 11 Eq. 324; *Thornton* v. *Bright*, 2 M. & C. 230; *Dickinson* v. *Mort*, 8 Ha. 178).

Woman past child bearing.

In *Cooper* v. *Laroche* (17 Ch. D. 368), V.-C. Malins held the restraint on anticipation in the case before him valid, because he considered that no woman to whom the restraint would apply could come into being after the date of the appointment. In that case the testator gave his property to trustees upon trust after the death of certain life tenants for all the children equally of A. and B. (two females), who should be living at the determination of the previous life interests, sons' shares to be paid at twenty-one, daughters' shares to be for their separate use for life without power of anticipation, and after their deaths as they should appoint. At the date of the will A. was dead and B. was past child-bearing; and under these circumstances the V.-C. held that all the children of A. and B. must necessarily be *in esse*, and that, consequently, the restraint would not tie up the property beyond the limits; (and see *Herbert* v. *Webster*, 15 Ch. D. 610). But the practice of the Court in treating women of a certain age as past child-bearing is not a rule of law but is a mere rule of convenience in the administration of estates; there is no legal impossibility in a woman of 100 years old bearing a child (Co. Litt. 40 b; see *Jee* v. *Audley*, 1 Cox, 324; *Re Sayer*, 6 Eq. 319; *Re Dawson*, *Johnston* v. *Hill*, 39 Ch. D. 155).

Gift contravening rule against perpetuity wholly void.

9. An appointment, which includes objects not within the line of perpetuity and which is not severable, is wholly void, and the fund cannot be given to those to whom it might have been legally appointed (Sug. Pow. 505; *Jee* v. *Audley*, 1 Cox, 324; Lewis on Perpetuity, 493; *Routledge* v. *Dorril*, 2 Ves. jun. 357).

"It is said, if all the children cannot take, why may not those to whom she might have appointed? I answer, because she did not mean those only, but all" (*per* Lord Alvanley, 2 Ves. j. at p. 366).

Appointment to a class.

Where there is a gift to a class, some of whom are within the rule against perpetuities and some are not, but the class itself and the shares of each cannot be ascertained within the legal limit, the whole gift is void. But where the individual shares of the members of the class can be ascertained within the legal limit, the gift is valid as to such as fall within the limit although bad as to the rest. If a stated sum be given to each member of a class, wholly independent of a similar gift to every other member of the class and cannot be affected, whether the other sums are paid or not, the gifts to those who are ascertained within the legal limit are good (*Wilkinson* v. *Duncan*, 30 Beav. 111; and sect. 6, p. 279, *ante*). And the power itself is not bad because it authorizes an appointment to persons who may not come into existence within the legal limit; a valid appointment may be made under such a power to persons born within due time (*Attenborough* v. *Attenborough*, 1 K. & J. 296). So, too, if there be an absolute appointment to an object of the power with an executory gift over to an object who may not be born in due time, the absolute appointment remains and the gift over only is void (*Re Brown and Sibly*, 3 Ch. D. 156).

Limitations over on void gift also void.

Where a gift is void for remoteness, all limitations expectant on such gift are also void, whether such limitations are or are not within the rule against perpetuities (*Proctor* v. *Bishop of Bath and Wells*, 2 H. Bl. 358; *Beard* v. *Westcott*, 5 B. & Ald.

801; T. & R. 25; *Re Thatcher's Trusts*, 26 B. 365; 1 Jarm. 283).

Gift over on alternative events.

But if there is a gift in one event which is void for remoteness and another independent gift on an alternative event which is not void, and the latter event happens, the gift is good. Thus, in *Longhead* v. *Phelps* (2 W. Bl. 704), trusts were declared of a term in case of the death of A. without leaving issue male, or in case such issue male should die without issue; and it was held that on the happening of the former contingency the trusts were effectual.

In *Monypenny* v. *Dering* (2 D. M. & G. 145), lands were devised to trustees upon trust for A. for life, and after his decease for A.'s first son for life, and after his decease for the first son of such first son and the heirs male of his body, and in default of such issue for every other son of A. successively for the like interests and limitations; and *in default of issue of the body of A. or in case of his not leaving any at his decease*, for B. for his life with remainders over. It was held that the failure of issue of A. at a too remote period, and A.'s death without leaving issue were independent alternative events, and that on the happening of the latter event the gift over in favour of B. took effect.

In *Watson* v. *Young* (28 Ch. D. 436), real estate was devised to trustees in fee upon trust for A. for life and after his death for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age, but *in case there should be no child, nor the issue of any child of A. who should live to attain the age of twenty-one*, then over. Pearson, J., held that the gift over was divisible into (1) a gift over in the event of there never being any child of A., and alternatively (2) a gift over in the event of no child or issue of any child attaining twenty-one; and that on the happening of the former alternative, which was not too remote, the gift over was effectual.

It may, however, be doubted whether *Watson* v. *Young* was rightly decided. It is certainly not law that every gift over may be analyzed into as many events as are included within its

language, and be held good or bad as the events happen. In *Evers* v. *Challis* (7 H. L. C. 531), the testator mentioned two contingencies, and in the event of one of such contingencies happening, made a gift over which could operate as a remainder, and in the event of the other happening, made a gift over which could operate only as an executory devise—the former event happened and the remainder vested, and it was held that this could not be affected by the nature of the contingency on which the executory devise would have arisen (*Re Bence, Smith* v. *Bence*, 1891, 3 Ch. 242; *Miles* v. *Harford*, 12 Ch. D. 691; *Abbiss* v. *Burney*, 17 Ch. D. 211; *Re Harvey*, 39 Ch. D. 289). If the trust or appointment be severable, part may be good (*Gooding* v. *Read*, 4 D. M. & G. 510), although the remainder be void (*Read* v. *Gooding*, 21 B. 478).

Excessive execution with reference to the terms of the power.

10. Excess with reference to the terms of the power may be either by way of conditions annexed, limitations or modifications added, or power delegated; the same rule applies to all.

Excess rejected if separable.

Where there is a complete execution of a power and something added which is improper, the execution is good and the excess void; but where there is not a complete execution, or where the boundaries between the excess and the execution are not distinguishable, the whole appointment fails (*Alexander* v. *Alexander*, 2 Ves. sen. 640, 644; *Hamilton* v. *Royse*, 2 Sch. & L. at p. 332; *Adams* v. *Adams*, Cowp. 651; *Macdonald* v. *Macdonald*, L. R. 2 Sc. & D. 482; *Re Farncombe*, 9 Ch. D. 652; Sug. Pow. 529).

"Suppose a power to a man to appoint 1,000*l.* among his children: if the father gives the 1,000*l.* to his children and annexes a condition that they shall release a debt owing to them or pay money over, the appointment of 1,000*l.* would be absolute, and the condition would be only void" (2 Ves. sen. p. 644).

Excess by way of condition.

In *Sadler* v. *Pratt* (5 Sim. 632), A., having four children by her first husband and three by her second, and having power to

appoint a fund among the former only, appointed it amongst all her children equally, and declared that if her children by her first husband should refuse to share the fund with her other children, the whole fund should go to her youngest child by her first husband. It was held that the appointment was not wholly void, but that the first class of children took each one-seventh of the fund under it, and the other shares went to them equally as in default of appointment; (and see *Palsgrave* v. *Atkinson*, 1 Coll. 190; *Watt* v. *Creyke*, 3 Sm. & G. 362; *Rooke* v. *Rooke*, 2 Dr. & Sm. 38; *Roach* v. *Trood*, 3 Ch. D. 429).

Whole appointment fails if condition is inseparable.

But it will be otherwise if the condition be inseparable from the exercise of the power.

In *Webb* v. *Sadler* (8 Ch. 419), the donee of a power of appointment among children appointed to trustees on such trusts as one of the children, by deed executed with the consent of the donee of the power during his life, and after his death with the consent of the trustees, should appoint. This consent was held to be inseparable from the power, and to render it wholly void; (and see *Hay* v. *Watkins*, 3 Dru. & War. 339; *D'Abbadie* v. *Bizoin*, 5 I. R. Eq. 205, which, however, is rather to be regarded as a case of a fraud on the power; *Re Perkins*, 41 W. R. 170).

It does not appear to have been decided whether the whole appointment would fail if the condition in excess were precedent: but it is difficult to see how in such a case there could be said to be any absolute appointment to the object of the power if the event on which such appointment was to arise had not occurred.

Excess by way of charge on appointed fund.

If there be an appointment to an object subject to a charge for an unauthorised purpose, the appointee will take the gift freed from the charge. In *Re Jeaffreson* (2 Eq. 276), the donee of a limited power appointed the balance of the fund, after payment of legacies to objects of the power, "to pay her own debts, and should any surplus remain" she gave it to an object of the power. This was held to be a gift, subject to an invalid charge: the charge therefore dropped, but the gift remained.

Conditional appointments, when good.

But the donee of a power of appointment among children which authorises exclusion may appoint to one child on a contingency, and if that contingency does not happen, then to

another child. In *Caulfield* v. *Macguire* (2 J. & L. 170), the donee of an exclusive power of appointment among children recited that her daughter M. had declared her intention of becoming a nun, and had already retired into a convent preparatory thereto, and that her patrimony in that case would be sufficient for her maintenance; and she added, that if her daughter changed her mind and returned to her family, she gave 1,000*l.* to trustees on trust for M. to receive the interest during her life, and at her decease to be divided amongst her children, if any; or in either case of her not leaving the convent or not leaving issue, the 1,000*l.* to be divided amongst other objects of the power. This appointment was held authorised by the power.

It is the same if the event on which the gift over is to take effect be some act to be done by the appointee, if such act be consistent with the scope of the power. In *Stroud* v. *Norman* (Kay, 313), the donee of a power of appointment and selection among children appointed to child M. on condition that she made a payment out of certain funds to her brothers, who were also objects of the power; and there was a limitation over to her brothers if she did not. This was held to be valid and within the scope and object of the power; (and see *Roberts* v. *Dixwell*, Sug. Pow. 930). So, in *Graham* v. *Angell* (17 W. R. 702), under a power to appoint amongst issue in such shares and proportions as A. should by will direct, a sum was appointed to a child in America, "if she applies for the same within twelve months after my decease," and in default to other objects of the power. This was held valid.

During the period while the contingency is undetermined, the interest on the appointed fund passes under the residuary appointment, if there be one (*Caulfield* v. *Macguire*, 2 J. & L. 170), and if not, goes as in default of appointment.

In *Butler* v. *Butler* (7 L. R. Ir. 401), an appointment to a son with a direction to withhold payment till he was thirty, and then to pay him, if in the opinion of the trustees he had behaved properly, was held a valid and absolute appointment with a nugatory direction superadded.

11. The principle in the construction of wills that a qualifying trust, introduced subsequently to an absolute gift, operates only so far as it can take effect, and that the rest of the gift remains in the original objects as given to them (*Lassence* v. *Tierney*, 1 Mac. & G. 551) applies to appointments under powers as well as to bequests and devises (*Churchill* v. *Churchill*, 5 Eq. 44; *Macdonald* v. *Macdonald*, L. R. 2 Sc. & D. 482). In *Churchill* v. *Churchill*, the donee of a power of appointment among children appointed the fund subject to the power to his three daughters equally, and gave his residuary estate to the same three daughters, and he went on to direct that the share to which each daughter would be entitled under the appointment and the residuary gift should be held in trust for the daughter for life, with remainder to her children. The appointment was held to give the daughters an absolute interest; (and see *Carver* v. *Bowles*, 2 R. & M. 304; *Woolridge* v. *Woolridge*, John. 63; *Kampf* v. *Jones*, 2 Keen, 756; *Harvey* v. *Stracey*, 1 Drew. 137—140; *Stephens* v. *Gadsden*, 20 Beav. 463; *Re Sondes*, 2 Sm. & G. 416; *Re Boyd*, 63 L. T. 92). Absolute appointment followed by modifications.

But no case has yet gone the length of deciding that, if the donee of a limited power appoints to an object of the power in trust for strangers, the object would hold the fund for his own benefit. In such a case it would probably be held that the whole appointment was one and indivisible (cf. *Rucker* v. *Scholefield*, 1 H. & M. 36; *Gerrard* v. *Butler*, 20 B. 541; *Tomkyns* v. *Blane*, 28 B. 422; Sug. Pow. 518, and *post*, s. 20); or perhaps the true objection against holding such an appointment valid would be that there was no intention on the part of the appointor to benefit the object to whom the appointment was actually made (see *Hamilton* v. *Royse*, 2 Sch. & L. at p. 332). In the cases above referred to, the appointees have all been primary objects of the appointor's bounty, and the quantum only of interest given has been modified. If there were no intention to benefit the appointee at all, it would be difficult to hold that he took absolutely. In *Wilson* v. *Wilson* (17 W. R. 220), a testator appointed to A. and B. (objects of the power), upon trust for various purposes, some within and some without

the scope of the power, and he appointed the residue, including all such portions the appointment whereof should from any cause fail, to A. and B. absolutely. This was held good; (see, too, *Swinburne* v. *Pitt*, 27 Ch. D. 696; *Re Meredith*, 3 Ch. D. 757; *Wallinger* v. *Wallinger*, 9 Eq. 301).

An executory gift over to a stranger will defeat the original appointment if the event happens.

12. If there be a gift over to a stranger by way of executory limitation, the original gift, although distinct from such gift over, will fail on the occurrence of the event on which the executory gift was limited to take effect, notwithstanding that such gift over, being to a stranger, cannot have any validity (*Doe* d. *Blomfield* v. *Eyre*, 5 C. B. 713; Sug. Pow. 512—14; *Robinson* v. *Wood*, 27 L. J. Ch. 726).

In *Doe* v. *Eyre*, the donee of a power of appointing real estate among children, appointed to a son in fee, subject to a charge in favour of another son. But in case neither of her sons should be living at the decease of her husband, she appointed to her trustee on trust for persons not objects of the power. The Court of Exchequer Chamber held that the son took a vested defeasible estate in fee, and that the appointment over alone was void; and as both the sons died in the lifetime of the father, the estate thereupon became divested and went as in default of appointment. On the other hand, in *Gatenby* v. *Morgan* (1 Q. B. D. 685), a testator by will in 1811 devised real estate to his daughter and her heirs; but if she died without issue living at her death, to the use of the nine children of A. equally. The testator's daughter died without issue, and one child of A. survived her. It was held that this child took for life only, that the executory devise affected the daughter's estate to the extent of such life estate only, and that subject thereto the property remained in the daughter and her heirs.

In *Jackson* v. *Noble* (2 Keen, 590), there was a gift to trustees on trust for A. for life, and after her death on trust to convey

to her heirs, executors, &c.; but in case A. should marry and have no children, then the property to belong to D.; or in case of his decease before A., then to his children. D. died in the lifetime of A., leaving no children. A. married and had no children. The Master of the Rolls said, that having regard to the intention of the testator and the words in which the gift over was expressed, that gift over was to take effect only in the event of A.'s marrying and dying without issue in the lifetime of D., or of his children; and as he died in A.'s lifetime without children, the contingent executory gift could not take effect, and the vested estate of A. could not be divested; (and see *Brown* v. *Nisbett*, 1 Cox, 13; *Ridgway* v. *Woodhouse*, 7 B. 437; *Hurst* v. *Hurst*, 21 Ch. D. 278; *Bate* v. *Willats*, 37 L. T. 221).

The question seems to be one of intention in each case, *i.e.*, whether the testator or appointor meant that the original gift should be absolute, unless the event on which the executory gift over is limited happened, *and* the gift over was then capable of taking effect; or whether the original gift was intended to cease absolutely on the happening of the event on which the gift over is limited, irrespective of the validity of such gift over (see *Webb* v. *Sadler*, 8 Ch. 419, 426). If, however, the gift over transgresses the rules against perpetuity, it is void, and the first gift remains absolute (Sug. Pow. 514; *Re Brown and Sibly*, 3 Ch. D. 156; 1 Jarm. 283).

Executory gift to an object in defeasance of an appointment to a stranger is good or bad, according to the event.

13. If there is an appointment to an object, followed by an appointment to a stranger absolutely, with an executory appointment over in certain events to an object, this executory appointment will fail or take effect according to the event: if the event on which it is to arise happens, it will take effect; if not, it will fail.

The same rule would apply if the appointment were by will to a stranger direct, with an executory appointment over; thus, if there be an appointment by will to A., a stranger, in fee, but if

he die without issue living at his death, to B., an object, the validity of this latter gift would depend on the event: if A. died without children, B. would take; but if not, B. could not take, although A., not being an object, could himself take nothing; and during A.'s lifetime, the estate would go as in default of appointment.

In *Alexander* v. *Alexander* (2 Ves. sen. 640), the donee of a power of appointing personalty amongst children appointed to a daughter, C., for life and after her death to her children then living: in default of such children, the property was to go to her if she survived her husband, but if she predeceased him, to J. and M., two other children of the donee. The appointment to the children of C. was of course bad; and the Master of the Rolls said, that if C. left children at the time of her death, it was impossible that any of the limitations over could take effect: that her children, although they could not take themselves, would yet prevent the limitation over. The contingency of the death of C. without leaving any children living at her death was not mentioned in the judgment.

In *Routledge* v. *Dorril* (2 Ves. 357), Lord Alvanley says, it would be monstrous to contend that although the appointment to a child is expressed to be on failure of the existence of persons incapable of taking, yet, notwithstanding they do exist, the child should take as if it was not appointed to them.

In *Long* v. *Ovenden* (16 Ch. D. 691), trust funds were vested in trustees for A., B., and C., in such shares as M. should by deed or will appoint, and in default for the same three persons absolutely. M. appointed one-third of the fund to A. for life or until alienation with remainder to a stranger (A.'s son), and if he should die before attaining twenty-one, then to B. A. survived M., and died while his son was still an infant. It was held that the appointment to B. would be good, if A.'s son died under twenty-one, and in that event would carry the income from A.'s death: but that, if the son attained twenty-one, the appointment to B. would fail, and both capital and income of the share would go as in default of appointment; (and see *Williamson* v. *Farwell*, 35 Ch. D. 128).

The gift fails or takes effect according to the event. In *Crompe* v. *Barrow* (4 Ves. 681), under a power to appoint among children, there was an appointment to a child for life and after his decease to his wife and children; but in case he should die without leaving a wife or child him surviving, then to another object of the power. The Master of the Rolls held the ultimate appointment good, and distinguished the case from *Routledge* v. *Dorril* and *Robinson* v. *Hardcastle* (1 T. R. 241), on the ground that the limitation over in this case was in effect to A. if B. should die without leaving a wife or children him surviving. "It fails as far as it affects to give interests to the children; but is there any occasion to make it fail upon the other point, the gift over to a person who is an object of the power? Why am I to exclude the person taking over, who has a right to take? There are two alternatives: if B. leaves no wife or children at his death, then the limitation over, being to a good object, shall take effect; if he does leave a wife or children, then it cannot take effect." Alternative gift.

In *Hewitt* v. *Dacre* (2 Keen, 622), the donee of a power of appointment among children, by will appointed shares to two of his daughters for life, "and in case any of the testatrix's children should die before her, she gave the share of him or her so dying to his or her lawful issue; but in case there should be no such issue, the survivors or survivor of the testatrix's own children to take." The Master of the Rolls said there was an alternative gift: it was as if the testatrix had said, If my daughter die in my lifetime and shall have issue, I give her share to such issue; but if she has no issue, I give her share to the survivors or survivor of my own children: as to the latter alternative the appointment is good in favour of the children surviving at the death of the testatrix; (and see Lewis on Perpetuity, 501).

14. Appointments to a contingent class are good, although there may be a period during which the persons who will form that class are not ascertained; and an appointment which is made to take effect at a future period is not void *ab initio*, because it may, when that period arrives, include persons not objects of the power; and an appointment made to take effect at a future period does not, if severable, become void *in toto*, because it turns Appointment to contingent class; or to take effect *in futuro*.

out when that period arrives that it actually does include persons not being objects of the power. The rule, as stated by V.-C. Kindersley in *Harvey* v. *Stracey* (1 Drew. 136), is as follows: "If a fund is appointed to objects of the power, that is, if in that respect it is correct, the appointment will be valid, notwithstanding that the persons who are to take as appointees, or the shares and interest which they are to take under the appointment, are made contingent upon a future event, provided the contingency must happen within the period prescribed by the rules relating to perpetuity; and if the fund is appointed not entirely to objects of the power, but partly to strangers, it will be still valid *quoad* those who are the objects of the power, and the appointment will fail only as to those persons who are not objects of the power."

In *Re Farncombe* (9 Ch. D. 652), there was a power to appoint among issue in existence at the date of the deed of appointment. An appointment was made by deed to a daughter for life, with remainder to the daughter's children in equal shares on their respectively attaining twenty-one, but if any died under twenty-one leaving issue, the share of the child so dying was to go to such issue and to vest at twenty-one. It was held that on the construction of this appointment it included strangers, *i.e.*, issue born after its date: that the appointment was not thereby avoided *in toto*, but that the share of each object would be determined by the total number of objects and strangers who should fall within the class in whose favour the appointment purported to be made; (and see, *ante*, pp. 144—147).

So, an appointment to an object of the power for life with remainder to his next-of-kin, will take effect, if at the death of tenant for life his next-of-kin are objects of the power (*Re Coulman*, *Munby* v. *Ross*, 30 Ch. D. 186).

Appointments to objects and strangers by way of successive limitations.

15. Powers may also be exceeded by limitations to or trusts in favour of persons who are not proper objects. In the simple case of an appointment of real or personal estate to A., a proper object, for life, with remainder to B., not an object, absolutely, the rule above stated (s. 10) applies, and the appointment to A. for life is good, and the remainder to B. fails, and

the estate which purports to have been appointed to him, goes as in default of appointment.

If the appointment were by will of real estate to A. for life as before, with remainder to the children of A. (not objects) in tail, the rule of *cyprès* would give A. an estate tail (see *post*, s. 22, p. 315).

But the case is less simple when the legal estate in land is appointed to a stranger for a particular estate, followed by limitations to objects, and different rules apply to such appointments according as they are made by deed or by will.

By deed.

If the legal estate in land be appointed by deed to a stranger for life with remainder to an object in fee, the whole appointment fails.

This rule is founded on the rule of law which requires every legal remainder to be supported by a particular estate of freehold.

In *Brudenell* v. *Elwes* (1 East, 442), the donee of a power of appointment among children appointed by deed life estates to a son and daughter respectively, with remainder to trustees to preserve, with remainder to the son's sons in tail, with remainder to another son for life, with remainder to trustees to preserve, with remainder to the second son's sons in tail, with remainder to the daughter in fee. Both the sons died without issue; but it was held that the remainder in fee to the daughter was invalid, as it was dependent on the invalid limitations to the son's sons. And the appointment being by deed the doctrine of *cyprès* could not apply, nor could it be in any way dependent on the event, for a deed speaks from its own date, and the estate created must be good *ab initio* in order to take effect.

Contingent Remainders Act.

It is enacted by 40 & 41 Vict. c. 33 as follows:—"Every contingent remainder created by any instrument executed after the passing of this Act (2nd August, 1877), or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure which would have been valid as a springing or shifting use or

executory devise or other limitation, had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation."

It is submitted that this Act has no application to the limitations mentioned in the rule. The Act applies only to contingent remainders; and the remainder suggested is in terms vested, although the tenant for life cannot take: it is simply a limitation of land *in futuro*, and as such must fail for want of a particular estate to support it. And it may be doubted whether the Act applies, if the remainder is in terms contingent, *e. g.*, if the limitation is to a stranger for life, with remainder to such of the objects of the power as are alive at his death or as shall attain twenty-one. The Act mentions the determination only, not the failure, of the particular estate; and, although it may be a narrow construction to place on the Act, it may be said that it is not legitimate in construing an Act of parliament to read "determination or ending" as including that which is usually contrasted with it by conveyancers, namely, "failure to commence."

By will.

An appointment by will of a particular estate to a stranger, with remainder to an object, is a good appointment in remainder; but the particular estate fails, and the subject of the power, during its continuance, goes to the persons entitled in default of appointment.

In *Crozier* v. *Crozier* (3 Dru. & War. 353), there was a devise of lands subject to a power of appointment among children to the testator's wife for life, on condition that she maintained his children thereout. The testator then bequeathed 500*l.* to each of his younger children and devised the said lands to his eldest son in fee. The devise to the wife was held void, except to the extent necessary to enable her to maintain the children, and to

raise 500*l.* for each of the younger ones, and the residue during her life went as in default of appointment: the son's remainder was held good, but was not accelerated.

In that case Lord St. Leonards examines the law on the subject of devises and testamentary appointments in an exhaustive judgment. As to devises, he says that although the particular estate is given to a person incapable of taking, or is not given at all, the devise in remainder or at the future time is valid. "Now this depends wholly upon intention, which the Courts execute even at the expense of the general rule of law, and this intention is thus executed, because the disposition is by will. Whether a man have the fee vested in him, or only a general power of appointment, his intention expressed in his will is equally to be executed. It matters not whether he appoints or devises, provided he do not exceed his power. . . . There ought to be no trifling distinctions between power and property upon merely technical grounds. The object of powers sanctioned by law is to enable the donee, to the extent of his authority, to do what a commensurate estate would have enabled him to accomplish." He then reviews the cases of *Alexander* v. *Alexander* (2 Ven. sen. 640); *Duke of Devonshire* v. *Cavendish* (4 T. R. 741, n.); and *Robinson* v. *Hardcastle* (2 Bro. C. C. 22, 344); and concludes that the question turns upon the intention, and not upon anything peculiar to powers, beyond the circumstance that the invalidity of the intermediate estates was occasioned by an excess in the execution of the power: and he considers that the same rule would be applicable whether such intermediate estates were invalid by an excess of the power, or by reason of a general rule of law; (and see *Reid* v. *Reid*, 25 B. 469).

These rules do not apply to personalty.

But these distinctions are not applicable to personalty, or to equitable estates in land. The destruction of a contingent remainder depends on the feudal law which required the freehold to be always vested in some existing person.

Remainder not accelerated.

16. An appointment by will to an object in remainder, after a particular estate to a stranger is not accele-

rated, unless a contrary intention can be gathered from the instrument executing the power: but the estate goes during the period over which the particular estate, if valid, would have extended, to the persons entitled in default.

In the case of the devise or bequest of a particular estate which fails, the remainder is accelerated, in the absence of intention to the contrary: in the case of wills executing powers, although the particular estate fails, the remainder continues such, and the estate during the life of the intended taker goes as in default of appointment (*Crozier* v. *Crozier*, 3 Dru. & War. 353, 365).

Unless an intention be shown.

But if the intention is clear, the remainder may be accelerated.

In *Craven* v. *Brady* (4 Eq. 209; 4 Ch. 296), the donee of a general power appointed real estate to his wife for life, and from and after her death to his son, with a proviso that if she should deprive herself of the rents and profits (which event happened) "her life estate should cease and determine as fully and effectually as it would by her actual decease." The M. R. considered that the testator had expressed a clear intention that if the appointment to his wife for life should cease by reason of any forfeiture, in that case the appointment in favour of the son should take effect at once; and he held accordingly that the son's estate in remainder was accelerated; and this was affirmed on appeal.

So, in *Line* v. *Hall* (43 L. J. Ch. 107), a father had power to appoint among children, and by his will appointed to trustees for a term of years on trust to raise portions for grandchildren (strangers), with a proviso for cesser of the term when the trusts should have been fully performed or should have become incapable of taking effect, with remainder, and in the meantime subject thereto, to a son for life, with remainder to his issue in tail. This was held a good immediate appointment to the son in tail, the term being, within the words of the appointment, "incapable of taking effect."

17. If the donee attempts to delegate his power, but does not appoint any estate in contravention of the terms of the power, and appoints in default of the execution of the delegated power to proper objects, this will be a valid appointment to them, the will being read as if the words purporting to delegate the power formed no part of it (*Ingram* v. *Ingram*, 2 Atk. 88; *Williamson* v. *Farwell*, 35 Ch. D. 128; *Slark* v. *Dakyns*, 10 Ch. 35; *Stockbridge* v. *Story*, 19 W. R. 1049).

A delegated power does not prevent the gifts over dependent on it from taking effect.

In *Carr* v. *Atkinson* (14 Eq. 397), the appointment was to M., an object of the power, during her life, and after her decease on such trusts for the benefit of any surviving husband (not an object of the power) of M. for his life or any shorter period as she should, notwithstanding coverture, by will appoint; and subject thereto, in trust for other objects of the power. The M. R. held that the will was to be read as if the words which related to the delegated power formed no part of it, and that the construction of the will was not affected thereby.

In *Webb* v. *Sadler* (8 Ch. 419), there was an appointment under a power of appointment among children to trustees, on such trusts as H. (a son) by deed executed with the consent of the father during his life, and after his death with the consent of the trustees of his will or by will, should appoint, and in default, on trust for H. for life or until bankruptcy, and after his death for his executors and administrators. It was held that the appointment on such trusts as H. should appoint, with consent, was void, but that the limitation over in default was valid, and gave H. an absolute interest subject to forfeiture on bankruptcy. The Lord Chancellor said: "The declared intention is, that unless estates that would displace this gift to the son are created in favour of other persons by means of the power, then the son is to take under this part of the instrument; and if the power is void, then no such estate could be created,

and the event never could arise which alone was meant to prevent the gift in favour of the son taking effect."

Appointments to objects and strangers equally.

18. Powers may also be exceeded by appointments to persons who are and persons who are not objects of the power.

> If the appointment be to persons some of whom are, and some are not, objects, and the appointment to the object is distinct and severable from that to the stranger, it will be valid, and the latter alone will fail.

In *Bruce* v. *Bruce* (11 Eq. 371), under a power to appoint an estate among A. B. and C., an appointment was made to A., charged with 3,000*l.* for the benefit of B., C. and D. This sum was held well appointed to B. and C. A. appears not to have claimed any part of the 3,000*l.* If he had, he would have been entitled to a share according to *Sadler* v. *Pratt* (5 Sim. 632); and see *Re Farncombe* (9 Ch. D. 652).

In *Re Kerr* (4 Ch. D. 600), a fund was given by will on trust for such of the children of M. as she should by will appoint, and in default of appointment for her children equally. She appointed the fund by will to her "children E. and C., their executors, administrators, and assigns, for their own use and benefit." E. was illegitimate, and C. legitimate. This was held to be an appointment of the fund in moieties, one moiety being well appointed to C., and the other devolving as in default of appointment. The difficulty in the case arose from the fact that the appointment was to the appointees as joint tenants. If the appointment had been to them as tenants in common, there would have been no difficulty. It is by no means clear that the M. R. would have come to the same conclusion if the appointed property had been real estate.

If the gifts to the objects and to strangers are not separable.

19. If the appointment be to persons as a class, some of whom are and some are not objects, and it is impossible to define how much of the ap-

pointment falls within the power and how much without it, the whole appointment will fail.

In *Re Brown* (1 Eq. 74), there was a power of appointment among "all and every the children or child or more remote issue" of a marriage given to the wife. She appointed to trustees upon trust to pay the income to the only child of the marriage for life, or until he became bankrupt or assigned, and then to trustees for his life "for the benefit of the said son, his wife and children, or any of them, as the trustees should think expedient." The appointment was held void *in toto*. The first appointment to the son until death or assignment or bankruptcy was good (*Carr* v. *Atkinson*, 14 Eq. 397); the report seems to imply that it was altogether bad; but as the son had assigned, his estate had then terminated, so that it was not necessary to consider the point. *Alexander* v. *Alexander* (2 Ves. sen. 640) is not an authority on this point.

In *Harvey* v. *Stracey* (1 Drew. 73, 117), the Vice-Chancellor says: "Now when an appointment is to a class, some of whom are within, and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A., who is within the limits, and say so much is to go to him, though the others are not within the limits, yet the appointment to A. shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails."

20. If there be no absolute appointment to an object of the power, but the appointment is coupled with the whole series of invalid limitations over, so as to form one system of trusts, the whole appointment will fail.

The appointment must be absolute and distinct in order to prevail.

In *Rucker* v. *Scholefield* (1 H. & M. 36), the donees of an

exclusive power of appointing among children and their issue born during the donee's lifetime, appointed that the trustees should stand possessed of the fund upon the trusts following, that was to say, on trust to appropriate one-fifth for the benefit of each daughter, and to pay and apply the income of the share of each for her separate use; and after the decease of each daughter, upon trusts for the benefit of her children. The life interests only were held valid. V.-C. Wood said: "In all cases of this kind, the question turns upon the language in which the appointment is attempted to be made. If you find a clear and definite gift of the property to be appointed, and then, engrafted upon that, subsequent provisions directing the fund to be settled, so as to show that the purpose was, first, to make the gift to and for the benefit of the person named, and then to have the fund settled: in a case of that kind, if the limitations of the proposed settlement are such as cannot become operative, the first absolute gift is held to take effect without restriction. So if you find a clear gift, followed by words which affect to divest it, and the limitations over are imperative, then the Court will uphold the gift, striking out the limitations which cannot have any legal effect. But if the words of the original gift are coupled with the whole series of limitations over, so as to form one system of trusts, then all that can be done is to give effect to so much of the limitations as may be consistent with law." In that case, the trustees were to stand possessed of the fund "on the trusts following:" then followed the trusts as above. The reference to the trusts following must be taken to include all the trusts, following, as they did, in one connected series. He held it impossible to stop after the first part, which, if it stood alone, would no doubt confer absolute interests on the daughters; but he must take the reference to be to the whole system of trusts, and the result was that each daughter took a life interest in one-fifth for her separate use, and, subject to that, the fund went as in default of appointment. It is a question to be decided in each case, whether the words of appointment are sufficient to vest the property in the objects of the power absolutely with something improper superadded, or

whether the superadded terms constitute an essential part of the appointment itself; (and see *Reid* v. *Reid*, 25 B. 469).

Are appointments apportionable in respect of the acts to be done under them?

21. Although the Court will uphold *pro tanto* an appointment which is partly good and partly bad if the good and bad are separable, it is doubtful whether this principle could in practice be extended so as to apportion an appointment, not in respect of the persons to whom it is made, but of the acts to be done by its direction. Thus in *Ferrand* v. *Wilson* (4 Ha. 344), where the power was to cut timber and accumulate the produce for a term beyond that allowed by law, V.-C. Wigram (p. 377) doubted whether a power, not to effect a single act at a period too remote, but to do successive acts from time to time, each being *pro tanto* an exact fulfilment of the intention of the testator, might not be apportioned and sustained, so far as its operation in each case did not evade the rule against perpetuities, and held void only from the time that it would begin to infringe that rule. On principle, there would appear to be no objection, but it is difficult to see how any such power could be modelled so as to preserve the intention of the testator (but see *ante*, s. 6, and *Jee* v. *Audley*, 1 Cox, 324).

Cyprès.

22. The Court in some instances interposes in favour of the general intention and executes the particular intention *cyprès*.

> The doctrine of *cyprès* applies to testamentary appointments as well as to devises (*Stackpoole* v. *Stackpoole*, 4 Dr. & W. 320). But it does not apply—1, to appointments by deed (*Brudenell* v. *Elwes*, 1 East, 440); 2, to appointments of personalty (*Routledge* v. *Dorril*, 2 Ves. jun. 357, 365); 3, or (*semble*) to appointments of blended real and personal estate (*Boughton* v. *James*, 1 Coll. 44).

The doctrine of *cyprès*, as applicable to ordinary devises, is thus stated by Lord Mansfield in *Chapman* v. *Brown* (3 Burr. 1626):—"Where there is a limitation for life to a person unborn, with remainder in tail to the first and other sons, as they

cannot take as purchasers but may as heirs of the body, and as the estate is clearly intended to go in a course of descent, it shall be construed an estate tail in the person to whom it is given for life." It has been said that the doctrine is not to be extended (*Parfitt* v. *Hember*, 4 Eq. 443, and *contrà*, *Mortimer* v. *West*, 2 Sim. 274); and it is inapplicable where the limitation to unborn children gives them the fee (*Hale* v. *Pew*, 25 B. 335; *Humberston* v. *Humberston*, 2 Vern. 738): but its application is not limited to wills of an executory nature (*ibid.*). The doctrine is considered and explained by Jessel, M. R., in *Hampton* v. *Holman* (5 Ch. D. 183). And by analogy to this rule,

Doctrine of *cyprès*.

If the donee of a power appoint by will to A., an object of the power for life, with remainder in tail to his first and other sons who are not objects, this shall be construed an estate tail in A. (*Pitt* v. *Jackson*, 2 Bro. C. C. 51; *Stackpoole* v. *Stackpoole*, 4 Dr. & War. 320).

But the particular estate must be appointed for an estate of freehold; a term of years determinable on lives will not suffice to found an estate tail upon (*Beard* v. *Westcott*, 5 Taunt. 393); and the appointment in remainder to the children must be to them in tail (*Bristow* v. *Warde*, 2 Ves. jun. 336; *Hale* v. *Pew*, 25 Beav. 335; *Humberston* v. *Humberston*, 2 Vern. 738).

Restriction.

And although by this doctrine an estate may be carried otherwise than in the exact form and manner indicated by the testator, yet it must always be in favour of a class or part of a class of persons intended to be provided for by the testator (*Monypenny* v. *Dering*, 2 D. M. & G. 145). In that case, estates were devised to A. for life, remainder to his (unborn) first son for life, remainder to that unborn son's first son in tail male; and the Lord Chancellor said he could not by the doctrine of *cyprès* include any limitations which would provide for the second and other sons of the first grandson, contrary to the words of the will. In *Pitt* v. *Jackson*, however, the estate was carried in a different form and manner; for the remainder

was to the grandchildren as tenants in tail in common; the tenancy in common was rejected. In *Line* v. *Hall* (43 L. J. Ch. 107; 22 W. R. 124) a father had power to appoint land by will to any one or more of his children. He gave it with other lands of his own to trustees for a term to raise portions for grandchildren (not objects); and subject thereto to a son for life with remainder to his issue in tail. It was held that the son took *cyprès* an estate tail in the appointed property.

Application of the rule apportioned.

23. But the rule is not to be applied except when the necessity of the case requires it: the Court will therefore apportion its application. In *Vanderplank* v. *King* (3 Ha. 1), there was a devise to A., the testator's daughter, for life, and after her decease to all and every the child or children of A. for their respective lives, and after the decease and respective deceases of such child or children of A., to all and every the child or children of all and every such child or children of A., and the heirs of his, her, and their respective bodies, as tenants in common. Although the devise was to the children of A. as a class, the children of A. born in the testator's lifetime were held to take estates for life, and the estates devised to the children of an afterborn child were alone altered.

24. Where the estates created are excessive, the rule is analogous to that stated in s. 10 with reference to limitations to or conditions in favour of strangers to the power.

Excess by way of estate larger than authorized.

If there is a complete execution of the power, but something more is added, whether by way of limitation or otherwise, and if the Court can see the boundaries, so as to separate the good from the bad, it will uphold the execution *pro tanto*.

"Where an act is done in execution of a power, though the party goes beyond the power, yet if you can sever what is beyond the power from what agrees with it (as for instance where the appointment is made subject to a limitation over, and the power did not authorize such a limitation), you may reject that part of the instrument, and let the appointment stand for the

rest; but you must see clearly and distinctly what the person alleged to have executed the power had in view, and that he applied his mind in such a way, that you are satisfied that if he had rightly understood the extent of his power, he would so have executed it" (*per* Lord Redesdale, 2 S. & L. 332).

A lease for forty years under a power to lease for twenty-one years has accordingly been held good for twenty-one years (*Campbell* v. *Leach*, Amb. 740; *Alexander* v. *Alexander*, 2 Ves. sen. 644). And if the like power were exercised by a lease for twenty-one years, and upon the determination of that estate for a further term, it would be good *pro tanto*. But it will be otherwise if the execution be bad *ab initio* as transgressing the essence of the power—*e. g.*, if under a power to grant leases in possession for twenty-one years, a lease in reversion for forty years be granted, it will fail *in toto*. So, too, a lease of land held for charitable uses is absolutely void, if it be made for more than twenty-one years without the leave of the Charity Commissioners (*Bishop of Bangor* v. *Parry*, 1891, 2 Q. B. 277).

A power to charge a particular sum, as 7,000*l.*, will be duly executed by a charge of a larger sum, as 8,000*l.*, and the excess only will be void (Sug. Pow. 521, citing *Parker* v. *Parker*, Gilb. Eq. R. 168).

What is a good execution in respect of the interest given.

25. In considering what is a sufficient execution in respect of the estates or interests given by the appointments, it is not always easy to ascertain from the decided cases whether the Court has held that the appointment was good in fact, or whether it has held it good in equity, in the sense that, though defective, equity would aid and cure the defect. The distinction may be important, because it is not every case of defective execution that is aided (see Ch. VII., *post*). Cases where such a question arises must necessarily be those only where the power is limited; for the donee of a general power has in effect absolute dominion over the property subject to the power, and can deal with it by means of his power as fully as if he were seised in fee or absolutely possessed of it; but the donee of a limited power has a duty to perform towards the

objects of his power, and cannot arrogate to himself rights of ownership beyond such as the author of the power may have given him. The Court has given effect to executions of powers in many instances where the intention to execute in accordance with the spirit of the power has been clear, although at law they might be invalid; *e. g.*, a limitation to the use of such of the children of A. as he should appoint would be well executed in equity by an appointment to trustees on trust for such children: but such an appointment would be void at law; that is to say, the use raised by virtue of the power must necessarily be in some of the persons named, and the legal estate would not be carried to the trustee, because he is not one of such persons; nor to the children, because the appointor has not designated them for that purpose. But in such a case the appointment is good in equity, because it complies with the purposes of the power, which is that the children shall have the estate, and the interposition of a trustee is mere machinery; (see 2 Preston, Abstracts, 270). It has been held that uses under the Statute of Uses can only arise under the exact circumstances specified (*Wright* v. *Wakeford*, 4 Taunt. 213; *Newman* v. *Warner*, 1 Sim. N. S. 457); but this is confined to the legal estate raised by the statute. A more liberal construction has been extended to the execution of powers in equity; and the principle acted on may be stated thus:—

> Appointments made in substantial accordance with the expressed purpose of the power, although not strictly in accordance therewith *modo et formâ*, are good appointments in equity.

Appointment of legal estates in land to trustees.

Thus in *Thornton* v. *Bright* (2 M. & C. 230), real estate was settled on the marriage of A. to the use of himself for life, with remainder to the use of the children of the marriage for such estates and in such shares and with such limitations over and charged with such sums for the benefit of such children and in such manner and form as A. should appoint; personal estate was also vested in the trustees of the settlement on similar

trusts. A. by his will appointed to trustees (not the trustees of the settlement) on certain trusts for the benefit of a child of the marriage; this was held valid by the Vice-Chancellor as to the personalty, but void as to the realty: on the latter point he was reversed, and the appointment was held good as to both. In *Hervey* v. *Hervey* (1 Atk. 561), it was attempted to execute a power to jointure by appointing the estate to trustees, on trust to pay an annual sum to the wife. Lord Hardwicke said that a power to jointure was a power to create a legal estate (Co. Litt. 36 b.), and was not well executed by creating a trust; but he considered the wife entitled to her jointure in equity, and decreed accordingly.

Rent-charge for jointure.

In equity, a power to appoint an estate authorizes a sale and a gift of the produce of the estate (*Crozier* v. *Crozier*, 3 Dru. & War. 371; *Churchman* v. *Harvey*, Amb. 339).

Appointment of proceeds of sale.

In *Kenworthy* v. *Bate* (6 Ves. 793), land was limited to the use of such children of A. as he should appoint: an appointment by him to trustees on trust to sell and divide the produce among the children was held to be substantially a good appointment.

In *Fowler* v. *Cohn* (21 B. 360), the Master of the Rolls said: "I find it quite settled by the authorities that a general power of disposition (among a class) of the whole property includes the power of sale, and consequently the power of sale is incidental to the power of disposition of the property in such manner and form, although the original will does not expressly include a direct power of sale"; (and see *D'Abbadie* v. *Bizoin*, 5 I. R. Eq. 205; *Re Swinburne*, 27 Ch. D. 696).

Power to charge.

A power to charge to an unlimited amount will authorize a like appointment (*Long* v. *Long*, 5 Ves. 445).

Execution, by creation of a term of years, of rent-charge.

And a power to appoint for such estate or estates in such parts, shares and proportions, and in such manner and form as the appointor should think fit, has been held to authorize an appointment to trustees for 500 years, on trust for objects of the power (*Trollope* v. *Linton*, 1 S. & S. 485). So a power to appoint and divide land enables a charge of money on the land (*Roberts* v. *Dixwell*, Sug. Pow. 930; *Thwaytes* v. *Dye*, 2 Vern. 80).

Rentcharge.

In *Ricketts* v. *Loftus* (4 Y. & C. Ex. 519), there was a limitation to the use of the children of A. for such estate or estates, and in such parts, shares and proportions, manner and form as A. should appoint; an appointment of a rent-charge to one child, and the estate, subject thereto, to another was held good.

A power to raise a sum of money would probably be held to authorize the limitation of an annuity or rent-charge (*Marnell* v. *Blake*, 4 Dow, 248). And in *Muskerry* v. *Chinnery* (Ll. & G. at p. 227), Lord St. Leonards says that such a power might probably be exercised by a lease on a fine; (and see Sug. Prop. II. of L. 486; and *Dennett* v. *Pass*, 1 Bing. N. C. 388).

Less estate than fee may be appointed.

A power to appoint the fee authorizes the appointment of any smaller interest (*Bovey* v. *Smith*, 1 Vern. 84), and also of any legal limitations within the scope of the power, which may be served out of the fee (*Crozier* v. *Crozier*, 3 Dr. & War. 353, 370).

Appointment of estate instead of proceeds of sale thereof.

A power to appoint estates to be purchased with money to arise from the sale of other settled estates is well exercised by an appointment operating directly on the original estates (*Bullock* v. *Fladgate*, 1 V. & B. 471).

To raise money.

A power to an executor to raise 500*l.* of the testator's estate, accompanied by a direction to see debts paid, gave a power of sale for those purposes (*Wareham* v. *Brown*, 2 Vern. 154; *Bateman* v. *Bateman*, 1 Atk. 421).

To charge a gross sum: interest.

A power to appoint a sum of money, or to charge a gross sum on an estate, authorizes the appointment of interest thereon (*Roe* v. *Pogson*, 2 Madd. 457); and a power to raise a fixed sum by mortgage implies a power to raise the costs of the mortgage also (*Armstrong* v. *Armstrong*, 18 Eq. 541). The appointment, however, of (say) 5,000*l.*, part of a sum of 20,000*l.*, does not necessarily carry interest; the rule is, that if the appointment is vested and the sum appointed is severed from the residue, it will carry interest (*Dundas* v. *Wolfe Murray*, 1 H. & M. 425). But if the sums given are contingent on some future event, no interest is payable (*Gotch* v. *Foster*, 5 Eq. 311; and see *post*, "Powers of Charging").

To appoint on such trusts.

A power to appoint on *such trusts* as the donee pleases in favour of a class gives him a right to declare a trust for sale and to

add such further trusts as may be necessary to effectuate his purpose, including therein the ordinary trustees' receipt clauses (*Cowx* v. *Foster*, 1 J. & H. 30; but as to the receipt clause, see *Cox* v. *Cox*, 1 K. & J. 251). This clause would now be supplied by the Conveyancing Act if a trust or a power of sale were found in the instrument.

Receipt clause.

To convert.

In a case where lands were settled, so as to be subject to the joint power of appointment of husband and wife among the children of the marriage for such estates and interests and in such manner as they should think fit, and in default the estate was to be held in trust for all the children at twenty-one or marriage, equally, and the settlement contained a power of, but no trust for, sale; it was held that the appointors had power to convert the real into personal estate on appointment so as bind the representatives of the appointees (*Webb* v. *Sadler*, 14 Eq. 533; 8 Ch. 419).

Mixed fund.

A power of appointing a mixed fund of real and personal property to a class is well exercised by an appointment of the realty to one member of the class and the personalty to another: it is not necessary that each of the objects should have a part of each kind of property appointed to him, although the power is non-exclusive (*Morgan* v. *Surman*, 1 Taunt. 289).

Life estates with remainders over.

A power of appointment among a class is well executed by an appointment to one object for life, with remainder to the other objects, or by cross gifts from one to another (*Alloway* v. *Alloway*, 4 Dru. & War. 387; *Wilson* v. *Wilson*, 21 B. 25): subject to the rules against perpetuity, *ante*, par. 2, pp. 286 *et seq.*

Appointment for life with general power of appointment.

A power of appointment among children is well executed by an appointment to one for life with power to dispose of the capital by deed or will: for this in effect gives the whole beneficial interest and does not transgress any rule against perpetuity (*Bray* v. *Bree*, 2 Cl. & Fin. 453).

And a like appointment to an object of the power for life, with a power of disposition by will only, is good, if such object was in esse at the time of the creation of the power (*Phipson* v. *Turner*, 9 Sim. 227). Secus, if he were not then in esse (*Wollaston* v. *King*, 8 Eq. 165).

Separate use.

An appointment to an object for her separate use may be made under a power to appoint personalty in such proportions as the donee shall direct (*Alexander* v. *Alexander*, 2 Ves. sen. 640; *Dickinson* v *Mort*, 8 Ha. 178; *Willis* v. *Kymer*, 7 Ch. D. 181): but an appointment to a married woman's husband was bad even before the Married Women's Property Act (Sug. Pow. 687); and *à fortiori* since that Act. As to restraint on anticipation, see *ante*, p. 295.

Power to direct maintenance.

A power given to a married woman to appoint among her children, "with such directions or regulations for maintenance, education, and advancement," as she should please, was held improperly executed by an appointment to the husband, until the youngest child attained twenty-one, in or towards the maintenance and education of all her children (*Lloyd* v. *Lloyd*, 26 B. 96). The ground of the decision was that the appointment was practically for the benefit of the husband, for he might claim the funds, whether there were any children or not (*Hammond* v. *Neame*, 1 Sw. 35; and see *Chester* v. *Chadwick*, 13 Sim. 102). In *Re Main* (15 W. R. 216), a wife had power under her settlement to appoint income to her husband so long as he continued a widower with a proviso that he was to employ it for the maintenance of his children; and it was held that the husband was entitled under an appointment made to him, although there was no child.

Power to alter and vary terms of marriage articles.

A power in marriage articles to husband and wife to alter and vary the provisions of the articles as they should think fit, previous to the execution of the settlement, did not authorize the insertion in the settlement of a power enabling the husband to jointure a future wife or charge portions for younger children of a future marriage (*D. of Bedford* v. *M. of Abercorn*, 1 M. & C. 312).

Power to advance.

In *Roper-Curzon* v. *Roper-Curzon* (11 Eq. 452), a power in a marriage settlement to advance to a son of the marriage part of the trust funds, "for placing or establishing him in any business, profession, or employment, or otherwise for his advancement or preferment in the world," was held to authorize payment of part of the trust fund to the trustees of a post-nuptial settlement

made by a son in favour of himself and his wife and the issue of their marriage, neither the son nor his wife being entitled to any property producing an immediate income, and the son being engaged in study, preparatory to entering the legal profession. And as to a daughter, see *Lloyd* v. *Cocker*, 27 B. 645.

A power of advancement for setting up the children of the testator in business will not authorize the advance of a married daughter's share to pay her husband's debts: but when the advance was made for the purpose of setting up the daughter in a farming business, the husband covenanting that the business should be her separate property, it was held good (*Talbot* v. *Marshfield*, 3 Ch. 622). But in *Re Kershaw* (6 Eq. 322), under special circumstances, an advance under a similar power to the husband on his personal security for the purpose of setting him up in trade was held good. In *Lowther* v. *Bentinck* (19 Eq. 166), a power to apply any part not exceeding half of a fund of which L. was tenant for life in or towards his preferment or advancement or otherwise for his benefit, was held to authorize the payment of L's debts, the interest on which absorbed nearly his whole income, and the principal of which he was unable to pay; (and see *Re Aldridge*, 55 L. T. 554 (C. A.)).

It has been held that money advanced to an infant under a power of advancement cannot be recovered back, although it was advanced for a particular purpose, *e.g.*, the purchase of a commission, and the infant has afterwards sold the commission and appropriated the money to his own use (*Lawrie* v. *Bankes*, 4 K. & J. 142).

Power to purchase annuity.

In *Messeena* v. *Carr* (9 Eq. 260), a power to trustees at their discretion to purchase an annuity for A. out of a trust fund, was held to be properly exerciseable by giving A. the whole fund or any part thereof. And an unlimited power to appoint dividends has been held to authorize an appointment of the capital (*Phillips* v. *Brydon*, 26 B. 77). A power to raise a given sum out of the rents and profits of an estate means that they are to be raised out of the estate, and authorizes a sale or mortgage for the purpose of raising them (*Metcalfe* v *Hutchinson*, 1 Ch. D. 591).

Different species of estate.

Although it has been decided that at law, where a freehold

interest is authorized to be appointed, a different species of estate cannot be created, yet in equity such execution will be good (Sug. Pow. 411). A power to appoint among children, in such manner and proportions as A. pleases, authorizes an appointment of capital and income and the postponement of payment of the capital partly until the majority of all the children and partly until the death or marriage of one of them (*Wilson* v. *Wilson*, 21 B. 25).

Postponement of payment.

26. Where the donee of a general power of appointment over personalty, whether a feme covert or not, executes the power and appoints an executor, the executor is entitled to receive the appointed fund (*Re Hoskin*, 6 Ch. D. 281), and can give a valid discharge for it (*Hayes* v *Oatley*, 14 Eq. 1). And inasmuch as the executor may require the fund for the payment of debts, and is liable for duty (*Re Cholmondeley*, 1 Cr. & M. 149), this is obviously just, although there are statements to the contrary in *Re Philbrick*, 34 L. J. Ch. 368; 13 W. R. 570.

By whom appointments are to be carried out.

Under general power.

Where, however, the power is limited, it appears to be a question of construction whether the power authorizes a direction to transfer the fund to other trustees. An appointment of a fund standing in the names of trustees to other trustees on trust for some of the objects may be a good equitable execution so far as the interests of the appointees are concerned; but the machinery adopted may exceed the power. The appointees' beneficial enjoyment is not affected, but the trustees of the original settlement will not get a good discharge in such a case if they transfer the fund to the new trustees. This construction was put upon the power in *Busk* v. *Aldam* (19 Eq. 16), by Malins, V. C., where he held an appointment to trustees for children good in equity, but would not order the fund to be transferred to such trustees. The trust in that case was for such one or more of the issue with such provisions for their respective maintenance, education, and advancement at such time or times, and in such shares, and charged with such annual sum of money, and with such limitations over for the benefit of some or one of them on such conditions, with such restrictions, and in such manner as the donee should appoint.

Under limited power.

Von Brockdorff v. *Malcolm* (30 Ch. D. 172), is to the same effect: and although the judgment of North, J., in *Scotney* v. *Lomer* (29 Ch. D. 535), perhaps exhibits some dissent from *Busk* v. *Aldam*, the words in the case before him, "with such trusts for the benefit of" the appointees, may have been held sufficient to authorize the nomination of new trustees. At any rate, the Court of Appeal in *Scotney* v. *Lomer* (31 Ch. D. 380), by no means dissented from *Busk* v *Aldam:* and it is submitted that that case is sound in principle. A settlor or testator who vests funds in trustees, and provides machinery for filling up vacancies in their number, may well be taken to have intended that the fund shall remain in the custody of the persons to whom he has entrusted it, until some beneficiary absolutely entitled is ready to receive it, although he has given power to another to say who that beneficiary shall be: he may well trust (say) his daughter to select which of her children shall take the fund, and yet not desire her to nominate the trustees who are to hold it.

CHAPTER VII.

DEFECTIVE EXECUTION.

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1. Executions of powers which are invalid at law by reason of their failure to comply with all the requisites of the power are aided in equity if there be a good consideration: the execution is not held actually good either at law or in equity, but the Court interferes and compels the person entitled in default of execution to make good the defect (Sug. Pow. 532). Defective executions of powers and defective surrenders of copyholds depend upon the same principles. The Court executes the intention of the settlor, either against his representatives or the person taking the estate in default of a valid execution of the power or surrender of the copyholds, where there is a good consideration. If there be such a consideration, the party taking the estate is not permitted to rely upon the defect; but the Court will effectuate the intention of the settlor, and, speaking generally, this equity is enforced, not against the

settlor himself, but in his favour—that is, in execution of his intention, and at the expense of a third party (*per* Lord St. Leonards, *Ellis* v. *Nimmo*, Ll. & Go. 348).

It is therefore, strictly speaking, inaccurate to say that a power is well executed in equity, although not at law; but equity in some cases supplies the defect, and thus practically makes the execution good.

Difficult to show any principle for the aid afforded by the Court.

Sir W. Grant, in *Holmes* v. *Coghill* (7 Ves. 506), says that it is difficult to discover a sound principle for the authority the Court assumes in aiding a defective execution in certain cases. "If the intention of the party possessing the power is to be regarded, and not the interest of the party to be affected by the execution, that intention ought to be executed wherever it is manifested: for the owner of the estate has nothing to do with the purpose. To him it is indifferent whether it is to be exercised for a creditor or a volunteer. But if the interest of the party to be affected by the execution is to be regarded, why in any case exercise the power, except in the form and manner prescribed? He is an absolute stranger to the equity between the possessor of the power and the party in whose favour it is intended to be executed. As against the debtor it is right that he should pay. But what equity is there for the creditor to have the money raised out of the estate of a third person in a case in which it was never agreed that it should be raised? The owner is not heard to say that it will be a grievous burden and of no merit or utility. He is told the case provided for exists: it is formally right: he has nothing to do with the purpose. But upon a defect which the Court is called upon to supply, he is not permitted to retort this argument, and to say, it is not formally right: the case provided for does not exist: and he has nothing to do with the purpose. In the sort of equity upon this subject there is some want of equality. But the rule is perfectly settled; and although perhaps with some violation of principle, with no practical inconvenience." It makes no difference who the persons entitled in default of appointment may be, whether children or strangers; nor whether the power is general or special. The same principle applies to all powers.

2. The rule is thus stated by Lord Alvanley:—

When equity will aid.

> Whenever a man having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shows an intention to execute such power, the Court will operate upon the conscience of the heir (or of the persons entitled in default), to make him perfect this intention (*Chapman* v. *Gibson*, 3 Bro. C. C. 229; *Lowson* v. *Lowson*, *ibid.* 272; *Cotter* v. *Layer*, 2 P. W. 623).

To the granting of the relief it is only necessary that the person executing the power defectively should have ability to raise the estate if the power had been properly pursued, and that the appointee should be one of the favoured classes (Sug. Pow. 536).

In what cases.

If the intention to pass the property subject to the power be clearly established, even although the intention to dispose of it under or by virtue of the power is not shown, still equity will give effect to the disposition, and hold that the property passes under the power (*Carver* v. *Richards*, 27 B. 488, 495).

Where the intention to pass the property, the persons to be benefited, and the amount of benefit are sufficiently indicated, and there is good consideration, there is enough for the Court to act upon, and it will rectify any mere informality in the mode of carrying out that intention: but it will not do so if any of these be wanting (*Garth* v. *Townsend*, 7 Eq. 221; *Kennard* v. *Kennard*, 8 Ch. 227).

Although the donee be a married woman.

It makes no difference that the donee of the power defectively executed is a married woman (*Dowell* v. *Dew*, 1 Y. & C. Ch. 345). "There is no doubt that the Court will aid the defective execution of a power in favour of a creditor or purchaser, though the donee of the power be a married woman. But the Court in such cases must be satisfied that the formalities which have not been observed are no more than matters of form, and that the donee of the power has not by their non-observance been de-

prived of any of the protection which a due exercise of the power would have afforded her: and the Court looks with especial jealousy on a transaction in which the wife may have acted under the influence of her husband" (*Thackwell* v. *Gardiner*, 5 De G. & Sm. 58, 65; *Hopkins* v. *Myall*, 2 R. & M. 86). In these cases no aid was granted against the married woman, although in *Thackwell* v. *Gardiner* the life interest was held bound by a deposit and memorandum.

Nature of the defect relieved against.

3. Equity relieves only against defects which are not of the essence of the power.

Courts of equity never uphold acts which will defeat what the person creating the power has declared, by expression or necessary implication, to be a material part of his intention (*Cooper* v. *Martin*, 3 Ch. 58). It is still competent to a settlor to make the nature and character of the instrument, by which the power he creates is to be executed, of the essence of the power, without observing which no execution shall be valid (*ibid.*).

Equity will supply defects which consist in the want of some circumstance required in the manner of execution, as the want of a seal or a sufficient number of witnesses (see now 22 & 23 Vict. c. 35); or where the exercise has been by codicil before the Wills Act, attested by only one witness (*Morse* v. *Martin*, 34 B. 500). (As to wills since the Act, see 1 Vict. c. 26, ss. 9, 10.) Or by will instead of by deed (*Sneed* v. *Sneed*, Ambl. 64). But it will not aid defects which consist in the omission or disregard of an essential part of the power.

In *Cooper* v. *Martin* (3 Ch. 47), the proceeds of estates devised by A. in trust for sale were to be held on such trusts as A.'s wife should by deed, sealed and delivered before their youngest child attained twenty-five, appoint, and in default, over. The donee appointed to all her children equally before the period expired, reserving a power of revocation: she afterwards by will, executed before but not coming into operation until after the youngest child attained twenty-five, appointed to the eldest son. The execution was held to be invalid, and the defect to be of such a nature as the Court would not aid.

So, too, a covenant or agreement for renewal, or to grant a lease *in futuro*, by the donee of a power of leasing in possession will not be aided after the donee's death, so as to bind the remaindermen. In *Harnett* v. *Yielding* (2 S. & L. 549, 559), the donee of a power of leasing for twenty-one years in possession at a rack rent made a lease, and thereby covenanted to renew for twenty-one years when applied to: this lease was surrendered, and an agreement endorsed thereon afterwards by the lessor to grant a fresh lease at any time the lessee should demand the same at a smaller rent. This was held bad, as being a fraud on the power, and not a mere defective execution which the Court would aid: the lessee offered to take a lease for twenty-one years if the lessor should so long live: but the Court refused that also. But it is doubtful whether the contract should not have been enforced so far as the lessor could legally execute the power (*Dyas* v. *Cruise*, 2 J. & L. 460; *Gas Light Co.* v. *Towse*, 35 Ch. D. 519). In *Hallett* to *Martin* (24 Ch. D. 624), trustees with power to grant building leases granted a lease without any covenant to build: this was held to be an essential, not merely a formal, defect.

Power of leasing improperly executed not aided against remainderman.

An order of the Court in a suit properly constituted brings all the parties before it; and accordingly in *Kennan* v. *Murphy* (6 L. R. Ir. 108; 8 *ib.* 285), where a lease was authorized by the Court, but the tenant for life did not execute it, it was held that the remainderman was bound by the order, and that the Statute of Frauds had no application (*Attorney-General* v. *Day*, 1 Ves. sen. 218).

Effect of order of Court.

In an unreported case *Ex parte East London Railway Company* (6 Dec., 1873, before James and Mellish, L. JJ.), a tenant for life, with the statutory power of leasing under 19 & 20 Vict. c. 120 (*i. e.*, for twenty-one years in possession), agreed in writing to grant a lease for seven years, renewable at the expiration thereof for another seven. This agreement was carried into effect by a lease for seven years which contained no covenant for renewal, and during the continuance of this term the lessor died. The lessee, on his land being taken by the railway company under the Lands Clauses Act, claimed compensation

in respect of a fourteen years term. V.-C. Malins considered the claim to be made out. The Lords Justices reversed his decision, holding that the lease was the expression of the intention of the parties, and that the agreement, if it were still existing, was not in accordance with the terms of the power, and could not be aided, as the defect was essential.

In the last case the term in possession and the term in reversion would have been within the power; but the Court thought it bad notwithstanding; and to the same effect was *Doe* v. *Lady Cavan* (5 T. R. 567), where a lease had been granted under a leasing power, and a further term was granted under the same power to the same lessee: the two terms together did not exceed the number of years for which leases were authorized to be made. The case was decided on another ground: but the Judges thought this objection fatal (Sug. Pow. 763).

Unusual covenants.

In *Medwin* v. *Sandham* (3 Sw. 685), the Court refused to interfere to aid a lease in which unusual covenants were introduced, which purported to have been granted in execution of a power to grant leases containing the usual covenants.

In *Lawrenson* v. *Butler* (1 S. & L. 13), a tenant for life had power to lease with consent: he agreed to grant a lease, without having obtained the consent. The Court refused to aid.

Power to be executed by will cannot be executed by deed.

A power to be executed by will cannot be executed by deed, and equity will not relieve, if the attempt is made. The creator of the power did not intend that it should be so executed: he intended it to be by will, or not at all; and it is impossible to hold that the execution of an instrument or deed, which, if it availed to any purpose, must avail to the destruction of that power the testator meant to remain capable of execution to the moment of the donee's death, can be considered in equity an attempt in or towards the execution of the power (*Reid* v. *Shergold*, 10 Ves. 370, 380; and see *Re Walsh*, 1 L. R. Ir. 320). And of course a court of equity will not aid a defective execution of a power which, if effective, would be a fraud on the power (*Re Kirwan*, 25 Ch. D. 373, 382). Nor will equity interfere to set up an execution which would be a breach of trust. In *Mortlock* v. *Buller* (10 Ves. 292, 317), trustees with a power of

Equity will not aid a breach of trust.

sale entered into a contract for sale without the necessary authority; specific performance was refused, and the Court declined to aid the contract as a defective execution of the power. It might happen that after the trustees in such a case had entered into a due contract, binding all parties, circumstances might arise that might prevent them from carrying it into execution. In such a case, although the power might be gone, the contract would be made good in equity by the persons who had got an interest in the estate by the effect of that interest (p. 315); that is, the Court would aid the execution, and compel the persons legally seised to complete the legal title; (and see *Ord* v. *Noel*, 5 Madd. 438).

On the same principle, where trustees had a power to grant new leases on the expiration or surrender of existing leases, "determinable on the decease of three lives to be named in every such new lease, but not for more lives at one and the same time"; and they demised to A. B. for ninety-nine years if three persons should so long live, and thereby covenanted to put in another life on certain conditions if any of the three should die: it was held to be a breach of trust, and the Court would not interfere to aid its performance (*Bellringer* v. *Blagrave*, 1 De G. & Sm. 63).

4. The Court will not aid the non-execution of a power: unless such non-execution has been procured by fraud (*semble*). Non-execution not aided

It is against the nature of a power, which is left to the free will and election of the party whether to execute it or not, to aid its non-execution (*Tollet* v. *Tollet*, 2 P. W. 490; *Holmes* v. *Coghill*, 12 Ves. 206). Non-execution of a power is where nothing is done: defective execution is where there has been an intention to execute sufficiently declared; but the act declaring the intention is not an execution in the form prescribed (*Shannon* v. *Bradstreet*, 1 Sch. & L. 52).

The Court, therefore, will not uphold as a valid execution an imperfect contract for sale even in favour of a purchaser for

valuable consideration—*e.g.*, a mere parol contract for the sale of lands, the only evidence of which is to be deduced from the conduct of the parties; except on the ground that it would be a fraud on the part of the person who might insist on the Statute of Frauds, to insist upon it; and this would not apply to remaindermen (*Morgan* v. *Milman*, 3 D. M. & G. 24; *Blore* v. *Sutton*, 3 Mer. 237); unless such remainderman has lain by and allowed money to be expended on the faith of the validity of the execution (*Stiles* v. *Cowper*, 3 Atk. 692).

Although due to accident.

The Court will not supply execution on the ground that the donee has been prevented by accident from executing the power.

In *Buckell* v. *Blenkhorn* (5 Ha. 131, 142), V.-C. Wigram says: "If the argument urged before me in this case be once admitted, it seems impossible to stop short of the conclusion that the donee of a power should in all cases be liberated from its restraint, whenever he *bonâ fide* intended to execute the power, but could not at a given moment ascertain what those restraints were, and death or accident prevented his compliance."

And the Court will not hold an execution to be intended because the donee was under a mistaken apprehension that by leaving the power unexecuted, certain persons whom he desired to benefit would take; the expressed intention being not to make any appointment (*Langslow* v. *Langslow*, 21 B. 553).

But execution will be supplied if it was prevented by fraud (*semble*).

But if a person be fraudulently prevented from doing an act, the Court will consider it as if that act had been done (*qu.*). Lord Eldon (1 J. & W. 96) states that in *Luttrell* v. *Olmius* (11 Ves. 638), Lord Waltham, a tenant in tail, having been fraudulently prevented from suffering a recovery, the estate was treated as if the recovery had been suffered, though in favour of a volunteer, and against one not a party to the fraud. Yet in the case before him (*Middleton* v. *Middleton*, 1 J. & W. 94) he refused to grant an injunction to restrain a husband from preventing his wife's solicitor from having access to her with a deed of appointment: and he said, "Suppose the lady should die without executing the deed, would it be possible for the Court to consider it done, when it does not appear that she gave instructions for it?" (but she did give such instructions, see p. 98).

"Wheresoever a man doth endeavour to inform himself of the circumstances of his own power and condition in order to revoke such a settlement, where he has a power to do so, and is hindered from coming at the knowledge of them, and especially by that person whose interest it is to prevent a revocation, he ought to be relieved in such a case, for it is against good conscience that any man should profit by such subtile, sinister practices" (*Bath and Mountague's case*, 3 Ch. Ca. at p. 84; and see *ibid.* 108, 122).

In *Vane* v. *Fletcher* (1 P. W. 352, 355), the Court would not supply a surrender of copyholds against the heir, although it was urged that the testator had done all in his power to surrender, and had made a letter of attorney to J. S. for that purpose, but the steward refused to accept it. The Court thought this a lucky accident in favour of the heir, which equity ought not to deprive him of. "But if the heir-at-law had himself done anything to have prevented the acceptance of the surrender, that had been material."

Persons in whose favour equity interferes.

5. Equity aids the defective execution of a power in favour of (a) purchasers for value; (b) creditors; (c) charities; (d) persons for whom the appointor is under a natural or moral obligation to provide, unless he is under an equal obligation to provide for persons entitled in default of appointment, and they are unprovided for.

The character of purchaser, wife, creditor, child, must be borne by the party claiming relief in relation to the donee of the power, and not to the person creating the power (Sug. Pow. 537; but see *contra*, *Wilkes* v. *Holmes*, 9 Mod. 485). And there is a distinction between persons claiming for meritorious and for valuable consideration; and good consideration is (*semble*) included in "valuable." The supplying the execution of a power which is defective, and the supplying a surrender of copyholds, go hand in hand; wherever the Court will supply the surrender,

it will supply the defective execution (*Chapman* v. *Gibson*, 3 Bro. C. C. 229, 231; *Sayer* v. *Sayer*, 7 Ha. 387); and it has been held that the Court would not supply a surrender, where the settlement contained a covenant to surrender copyholds for the benefit of the settlor's daughters (*Jefferys* v. *Jefferys*, Cr. & Ph. 138).

Otherwise, if it be a valuable consideration.

It is otherwise if the appointees or covenantees be purchasers for valuable consideration. When a person enters into a contract for the execution of a power for valuable consideration, but does not carry it into effect and exercise the power, the Court will supply the defect.

In *Re Dykes' Estate* (7 Eq. 337), lands stood limited to such uses as D. should by deed appoint, and subject thereto to the use of D. and the heirs of his body, with remainders over. D. was absolutely entitled to other lands. A railway company required part of the settled and part of the other estates. By agreement not under seal, after reciting that D. was owner of lands, part of which (specified in the schedule thereto) was required by the company, and the purchase-money and compensation to be paid to D. had not been ascertained, and that it had been agreed to refer these matters to arbitration, the parties thereto bound themselves to abide by such arbitration. The schedule comprised all the land required by the company without distinction of title, and a single sum was awarded as the purchase-money. Before the execution of any conveyance D. died. The Master of the Rolls held that the contract operated as an execution of the power in equity.

But equity will not aid, if there be no valid and binding contract (*Morgan* v. *Milman*, 3 D. M. & G. 24).

Covenant to appoint by will.

If the donee of a testamentary power of appointment among children covenant on the marriage of one of them to execute his power in his favour, and die without doing so, the covenant will operate as a defective execution, or will at any rate be satisfied by leaving the money to devolve as unappointed (*Thacker* v. *Key*, 8 Eq. 408); and see *post*, p. 408.

Purchasers for valuable consideration.

6. (*a*) The Court interferes in favour of purchasers, because it is unjust not to give them the benefit of their contracts. In order

to constitute a purchaser in whose favour a defective execution of a power can be aided, there must be consideration, and an intention to purchase either proved or presumed (*Sergison* v. *Sealey*, 2 Atk. 412). In *Hughes* v. *Wells* (9 Ha. 749, 769), it was held that the expenditure by a husband of his wife's money in the maintenance of their joint establishment did not furnish any consideration to the wife, and assuming that a transfer by a husband of his wife's legacy into her name and the carrying the income of it to her account might amount to consideration, it certainly did not prove any intention to purchase.

It makes no difference whether the purchasers be purchasers of the entirety or of part only. The defective execution will be aided *pro tanto*, if necessary—*e.g.*, the want of a surrender of copyholds was supplied in favour of a mortgagee in *Jennings* v. *Moore* (2 Vern. 609); and in *Dowell* v. *Dew* (1 Y. & C. Ch. 345) it was held that an agreement to grant a lease entered into a short time before the expiration of the existing lease by the donee of a power of leasing in possession only might under certain circumstances be aided in equity. Mortgagee. Lessee.

In *Long* v. *Rankin* (Sug. Pow. 900), C. J. Abbott says: "A lessee is in law and reason considered as a purchaser, even if he takes at the best rent the land be worth at the time, because he forms his engagements and regulates his affairs upon the faith of his lease, and often expends his money in the improvement of the land, in confidence that he shall reap the benefit of his expenditure by the enjoyment of his term." And a person to whom the donee of a power of leasing had agreed to grant a lease, might be aided, although the term had not commenced (if that were not contrary to the power), and although he had therefore been put to no expense, for his equity depends not on part performance, but on his contract.

Campbell v. *Leach* (Ambl. 740) was the stronger case of a lessee who had been let into possession under a defectively executed lease, and had on the faith of such lease expended large sums. But the mere relation of landlord and tenant makes the tenant a purchaser for valuable consideration to the extent of his lease, and he has all the advantages of such pur-

chaser; and every circumstance which would avail a purchaser in fee simple as a purchaser for valuable consideration would equally avail a lessee for years to the extent of his term (*per* V.-C. Malins, *Re King*, 16 Eq. 525). This seems, however, to have been doubted in Ireland (*Donnell* v. *Church*, 4 Ir. Eq. R. 630).

Creditors.

7. (*b*) Where a testator shows an intention to provide for the payment of his debts, the Court will supply a defective execution (*Chapman* v. *Gibson*, 3 Bro. C. C. 229).

"This is not to be confounded with the case of the heirs being disinherited by a will not duly executed: there is no will at all: the Court cannot see that there is such an instrument; but wherever there is such a power it has been executed" (*ibid*). The testator in that case had devised all his estate, having only copyholds not surrendered to the use of his will.

Property when actually appointed becomes assets for payment of debts.

A limited power of appointment among a class cannot of course form part of the appointor's assets, whether he execute his power or not. But both real and personal estate over which a man has a general power of appointment becomes assets for the payment of his debts, if the power has been validly exercised in favour of volunteers (*Fleming* v. *Buchanan*, 3 D. M. & G. 976; *Jenney* v. *Andrews*, 6 Madd. 264; *Williams* v. *Lomas*, 16 B. 1). The donee of the power having by his appointment displaced the title of those taking estates subject to the power, and so rendered the property his own absolutely, the Court treats it in like manner, follows this out to all its legitimate consequences, and treats his rights acquired under a general power as equivalent to absolute ownership (*per* V.-C. Wood, 2 K. & J. 681). As to this, and as to the question of the liability of estates appointed by married women to the payment of their general engagements, see *ante*, p. 256 *et seq.*

But the appointed property is the last to be applied in administering the appointor's estate, and is only used so far as is necessary to supply the deficiencies left by the other assets (*Silk* v. *Prime*, 2 W. & T. L. C.). And, as before stated, unless the power is executed, the property subject to it cannot be made assets: equity cannot supply non-execution (*Holmes* v. *Coghill*, 7 Ves. 499).

Purchaser has better equity than creditor.

And the equity of a purchaser from a party taking under a voluntary deed of appointment is preferred to that of general creditors having no specific charge (*George* v. *Milbanke*, 9 Ves. 190). The purchaser who pays a consideration to the voluntary appointee may constructively be held to be in the same situation as if he had in the first instance paid it to him by whom the power was executed (*Daubeny* v. *Cockburn*, 1 Mer. 626, 638).

Exception in cases of testamentary appointments.

But this does not apply to purchasers of shares appointed by will: they are in the same position as purchasers for value of a legacy (as to which, see *Re Knapman*, 18 Ch. D. 300; *Doering* v. *Doering*, 42 Ch. D. 203), and are subject to the same equities in respect thereof as the vendor: and therefore must refund it if necessary for the payment of debts (*Jennings* v. *Bond*, 2 J. & L. 720; see, too, *Morris* v. *Livie*, 1 Y. & C. C. C. 380; and as to legal devises, *Egbert* v. *Butler*, 21 Beav. 560; and *Fox* v. *Buckley*, 3 Ch. D. 511).

Creditors cannot have appointments to volunteers aided.

Nor can creditors claim to have the defective execution of a power supplied in their favour, when the appointee is a volunteer, and therefore would not be himself aided. This does not appear to have been expressly decided, and in *Holmes* v. *Coghill* (12 Ves. 206), Lord Eldon seems to think it might be done. But Lord St. Leonards (Pow. 540-1) considers that the limits of the law on this head are contained in the decided cases. "Where the fund is effectually given to a stranger, equity considers him a trustee of it for the creditors, and the remainderman has no ground of complaint, because the power is legally executed. Where a defect is supplied for the appointee, the relief has at least the merit of effectuating the intention of the person executing the power, although at the expense of the remainderman; but if this relief should be afforded in favour of creditors where the fund is not given to them, the same hardship would be imposed on the remainderman, and at the same time the intention of the donee of the power would be defeated. Upon this head of equity it is clearly established that the interests of the remainderman shall only be sacrificed to the intention of the donee of the power expressed in favour of a person from whom a valuable consideration moved, or in whose person a good consideration existed.

The first point to be established is the intention of the person executing the power, which in this case is not merely wanting, but his intention expressly was that his creditors should not have the fund. The common equity in favour of creditors, where the fund is given to others, does not arise until the power is legally executed."

Rights of purchasers without notice.

The usual rules as to purchasers for valuable consideration without notice apply to persons taking estates by means of the execution of powers as well as by ordinary conveyances. If therefore a power be executed in such a manner as not to be valid at law in favour of A., and be afterwards validly executed in favour of B., B.'s title will prevail if he had no notice of A.'s claim, for he will have got the legal estate and an equal equity. But this does not apply to persons who take subject to and in default of appointment: in most cases they are purchasers, yet equity sets up defective executions to their detriment, because they take subject to the power.

Charities.

8. (*c*) A power well exercised in all other respects will, in favour of charities, be deemed to be an effective execution of the power, although the form in which the power has been exercised has not conformed to the requisitions imposed by the instrument creating or giving the power (*Innes* v. *Sayer*, 3 Mac. & G. 620).

In *Attorney-General* v. *Burdet* (2 Vern. 755), it was held that an appointment by a tenant in tail to a charity should bind the remainderman, and it was said that the Statute of Charitable Uses (43 Eliz. c. 4) supplies all defects where the donor is of capacity to dispose, and hath such an estate as is in any way disposable by him, whether by fine or common recovery.

Mr. Tudor (Charitable Trusts, 2nd ed. 37) says that a most liberal construction was put on this statute by the Courts, upon the ground that the legislature was supposed to have intended thereby to cure all defects and omissions in point of form in instruments by which property was given to charitable purposes.

The Statute of Mortmain (9 Geo. 2, c. 36) did not repeal this Act; but appointments to charitable uses were required to conform to the directions contained in it (Sug. Pow. 208). But

the Act is now repealed by the Mortmain Act, 1888, 51 & 52 Vict. c. 42 s. 13.

9. (*d*) Equity will interpose in favour of persons for whom there is a natural obligation to make provision (*Chapman* v. *Gibson*, 3 Bro. C. C. 229). Persons claiming for meritorious consideration.

In aiding the defective execution of a power, either for a wife or child, its being intended for a provision, whether voluntary or not, will entitle the Court to carry it into execution (*Hervey* v. *Hervey*, 1 Atk. 567).

The Court will not inquire into the *quantum* of the provision: it is sufficient that the testator is acting in discharge of moral or natural obligations, and it is very difficult for the Court to enter into such an inquiry: the father must be the best judge (3 Bro. C. C. 230). It has been said that a wife or child applying for aid in the defective execution of a power must be wholly unprovided for. But this is not the right rule, for by the invariable and proper rule the Court considers the husband or father the proper judge of what is a reasonable provision (*per* Lord Hardwicke in *Hervey* v. *Hervey*, 1 Atk. 568). *Quantum* of provision.

Thus, a surrender of copyholds has been supplied in favour of a wife, although she had other provision (*Smith* v. *Baker*, 1 Atk. 385); and although her interest was only limited and the surrender could not be supplied in favour of those in remainder (*Marston* v. *Gowan*, 3 Bro. C. C. 170), and a defective execution has been aided in her favour (*Tollet* v. *Tollet*, 2 P. W. 489).

A defective execution has been aided in favour of a child, although the effect has been to put a younger child in a better condition than an elder (3 Bro. C. C. 230), and also in favour of a sister so as to take away the property from a brother, if he be otherwise provided for (*Lucena* v. *Lucena*, 5 B. 249; *Hume* v. *Rundell*, 6 Madd. 331; *Bruce* v. *Bruce*, 11 Eq. 371).

In *Morse* v. *Martin* (34 B. 500), the power was to appoint 3,000*l.* among children by deed or will duly executed, and attested by two credible witnesses; the donee, by his will before the Wills Act, appointed to all his children equally: next day, by codicil attested by one witness only, he revoked the appoint-

ment, and appointed 1,000*l.* on certain trusts for his daughter's benefit, and the remaining 2,000*l.* to his three sons. The Court supplied this defect in the attestation, to the prejudice of the three brothers, since they were also provided for.

Who are not within the consideration.

10. But Equity extends its aid only in cases where there is some natural or moral obligation on the part of the donee of the power to provide for the persons in whose favour the defective execution has been made.

No aid therefore will be afforded to a husband (*Moodie* v. *Reid*, 1 Madd. 516; 9 Ha. 769); a grandchild (*Kettle* v. *Townsend*, 1 Salk. 187, in H. of L.; *Perry* v. *Whitehead*, 6 Ves. 544); a natural child or cousin (*Blake* v. *Blake*, Beat. 575; *Bramhall* v. *Hall*, 2 Ed. 220; *Tudor* v. *Anson*, 2 Ves. sen. 582); a brother or sister (*Goodwyn* v. *Goodwyn*, 1 Ves. sen. 228); a nephew or niece (*Marston* v. *Gowan*, 3 Bro. C. C. 170); a volunteer, even although such volunteer be the creator of the power (see note to *Watts* v. *Bullas*, 1 P. W. 60). In *Sergison* v. *Sealey* (2 Atk. 414), a woman had a general power of appointment by deed or writing, attested by three witnesses, over a sum of money. By her marriage settlement she covenanted that 2,000*l.* thereof should be held for the benefit of her husband, and 2,000*l.* for her own separate use, but the settlement was attested by two witnesses only. The Court aided the execution so far as the husband was concerned, but refused to aid it as to her own 2,000*l.*, for that was based on no consideration, and was merely voluntary.

When the obligation to provide is equal.

11. And if the donee of the power be under an equal obligation to provide for the persons who would take in default of appointment (or for the heir in case of copyholds) and for the objects of the defective appointment, equity will not interfere, unless the heir or persons taking in default are otherwise provided for.

"The principle must be this, that the testator being under an obligation to do an act, we will compel the heir to perfect it; but we will not compel him to fulfil an obligation at the expense of another; and if the testator has totally forgot to make any provision for his eldest son, this shall be an answer to the claim

of the wife or other children" (*Chapman* v. *Gibson*, 3 Bro. C. C. 230).

This Court will not supply a surrender against the heir unprovided for; but it considers the parent the best judge of the provision of that heir, and will not examine the sufficiency of the provision, unless perhaps in a case in which it may be challenged as illusory (*Braddick* v. *Mattock*, 6 Madd. 361). But the heir must of course be heir in blood, and not *hæres factus* (*Smith* v. *Baker*, 1 Atk. 385); and (*semble*) not merely heir in blood, but a child; for there is no obligation to provide for any heirs other than children; and as a defective execution will not be aided in favour of a grandchild (for instance), it would seem to follow that his want of provision should be no bar to an application to the Court to aid a defective execution against him; although in *Rodgers* v. *Marshall* (17 Ves. 294), the Master of the Rolls seems to have thought otherwise.

The Court will not supply a defect in favour of a daughter to the prejudice of other persons standing in the same relationship, unless those others are otherwise provided for (*Morse* v. *Martin*, 34 B. 500; *Lucena* v. *Lucena*, 5 B. 249; *Hume* v. *Rundell*, 6 Madd. 331; *Re Walsh*, 1 L. R. Ir. 320).

What powers can be aided.

12. Powers of all sorts, with the one exception next mentioned, can be aided; it is only requisite that there should be a sufficient consideration; and, if the defect consist in the execution being merely a contract to execute, the contract must be a binding one. Thus, in *Wilkie* v. *Holmes* (1 S. & L. 60, n.), a power of charging was aided; (and see *Wade* v. *Paget*, 1 Bro. C. C. 368).

What cannot.

It seems, however, that enabling powers created by statute cannot be aided. Where an enabling or restraining statute creates or puts a limit upon a power, or, with a view to perpetuate an estate in a particular descent, from public policy relaxes the law of perpetuity, and gives powers to persons for ever in succession, such cases do not fall within the jurisdiction of the Court, but wholly depend on the law which created them (Sug. Pow. 564).

Lord Mansfield's observations in *Peachy* v. *Duke of Somerset* (1 Str. 447) (a case of relieving against forfeiture), have some

application to this question. "Cases of agreement and conditions of the party, and of the law, are certainly to be distinguished. You can never say that the law has determined hardly; but you may say that the party has made a hard bargain"; (see, too, *Keating* v. *Sparrow*, 1 B. & B. 367; *Re Brain*, 18 Eq. 389; *Att.-Gen. of Victoria* v. *Ettershank*, L. R. 6 P. C. 354; *Griffiths* v. *Vere*, 9 Ves. at p. 134).

If the legislature has authorized certain acts to be done in a particular way, it is difficult to see how the Court can give validity to any such act if done otherwise than in accordance with the statutory requirements; to give relief in such a case would be to legislate afresh. It may be said that, in the case of ordinary powers, the Court by the relief it grants adds to or takes away from the words of the creator of the power; but this is in order to effectuate the paramount intention, which in the case supposed is not fully and explicitly expressed in consequence of the want of skill or foresight of the party. The Court in effect says that the creator of the power cannot have intended a seal or the like to be essential to the due exercise of the power; for, if he added words of negation, providing that no instrument or execution should be valid that was not under seal, no relief could be granted (*ante*, p. 330). But it is of course impossible to apply this to the Legislature. If an Act of Parliament speaks of a lease, it means a lease and not an agreement for a lease; and it is not for the Court to supplement the Act, or to say that the words used must have been intended to include cases not within their natural signification, or that Parliament is *inops consilii*.

So, too, Lord Mansfield says (Cowp. 267; 2 Burr. 1146), that powers to a tenant in tail to make leases under the statute of 32 H. 8, c. 28, if not executed in the requisite form, no consideration ever so meritorious will avail. So with respect to powers under the Civil List Act, powers under particular family entails, as in the case of the Duke of Bolton, &c., equity can no more relieve from defects in them than it can from defects in a common recovery; but see *Luttrell* v. *Olmius* (mentioned 11 Ves. 638, by Lord Eldon), where a recovery was supplied in favour of a

volunteer, the tenant in tail having been fraudulently prevented from suffering it. If equity has jurisdiction to *supply* a recovery, it would seem that it could also aid a defect in suffering one; there does not appear, however, to be any case reported in which it has been done.

It is to be observed, too, that in 12 & 13 Vict. c. 26 (*post*, p. 351), leases granted defectively in execution of powers created by Act of Parliament are expressly enumerated; and it is submitted that this statute applies to leases granted under the Leases and Sales of Settled Estates Acts, or the Settled Land Acts. The fact that the powers of leasing given by these Acts are subsequent in date to the enabling Act, 12 & 13 Vict. c. 26, can make no difference. For uses created by the testamentary capacity given by the Statute of Wills (32 H. 8) are within the statute of 27 H. 8. "And it is frequent in our books that an Act made of late time shall be taken within the equity of an Act made long time before" (*per* Lord Coke, *Vernon's case*, 4 Rep. 1, at p. 4 a.; and see *Re Perrin*, 2 Dru. & War. 147).

Defective execution of powers of leasing aided.

13. It was at one time doubted whether equity would aid the defective execution of leases at all so as to bind the remainderman; or even so as to enable the lessee to obtain specific performance from the lessor of the lease agreed to be granted so far as such lease was *intra vires*. It appears now to be well settled (apart from the statutory aid hereafter mentioned) that if there be no fraud upon the remainderman, equity will regard the lessee as a purchaser *pro tanto*, and will relieve against any mere formal defect in the execution of a power of leasing as of any other power. "There are no doubt many cases in which Courts of Equity have compelled remaindermen to carry into effect contracts into which tenants for life with a power have entered; but those cases have, I apprehend, proceeded upon this principle, that the contract was to be considered as the defective execution of the power, which, therefore, a Court of Equity was justified in making good against the remainderman. But if this be the ground of those decisions, the first question to be considered is, could the tenant for life himself have done what the

remainderman is called upon to perfect?" (*per* Lord Cottenham, *Clark* v. *Smith*, 9 Cl. & F. 141).

In *Campbell* v. *Leach* (Ambl. 740), there were nine objections taken to the lease; the fourth and fifth were, "that the lease exceeded the power in the term granted being for twenty-six years, and the power only enabling a lease for twenty-one." "That it was not a lease in possession, but in reversion or *futuro*." L. C. J. De Grey said that at law the lease could not be supported or apportioned; but how was it in equity? The power was "for the benefit of tenant for life and the remainderman. If executing this power is for the benefit of the remainderman, it should receive a liberal construction; but if tenant for life invades the interest of the remainderman, in order to benefit his own only, it should have another construction." In that case it was not proved that an old lease had been surrendered; if this had not been done, the lease would have contravened the power in being in reversion; but as it had been abandoned, it was taken as if it had been surrendered; and the lease was supported for twenty-one years, the excess being rejected.

In *Shannon* v. *Bradstreet* (1 Scho. & Lef. 52), an agreement by tenant for life, with power of leasing, to grant a lease in accordance with the terms of the power, was enforced against the remainderman as an equitable execution of the power. Lord Redesdale points out (p. 61) that powers of leasing ought not to receive a less liberal construction as against the remainderman than powers of jointuring and the like, which are a mere burden upon him. In the case of powers to make leases at the best rent that can be obtained, it is evident that the author of the power looks to the benefit of the estate, and that the power is given for the benefit both of the tenant for life and of all persons claiming after him; for where the tenant for life can give no permanent interest, and his tenant is liable every day to be turned out of possession by the accident of his death, it is hard to procure substantial tenants; and therefore it is beneficial to all parties that the tenant for life should have power to grant such leases.

In *Dowell* v. *Dew* (1 Y. & C. C. C. 345), the donee of a power of leasing for twenty-one years in possession leased for fourteen years to D., and about a year and a-half before the expiration of the lease, agreed to grant D. a renewal of the lease on the same terms and for the same period as before. The lessor survived the period at which the first lease expired: the lessee remained in possession without getting a new lease, but doing acts on the premises referable only to the agreement. This agreement was held to be a valid execution of the power. It is to be observed that the lessor lived until she could have granted a new lease under her power: *semble*, it would have been otherwise, if the lessor had died before the expiration of the first lease (p. 356); (and see *Leslie* v. *Crommelin*, 2 I. R. Eq. 134; *Gas Light Co.* v. *Towse*, 35 Ch. D. 519).

But in order to bind the remainderman, there must be a valid and binding contract (*Morgan* v. *Milman*, 3 D. M. & G. 24). If there be a valid contract to grant the lease by a tenant for life with power of leasing, trustees who are donees of a similar power during the minority of a tenant in tail by purchase, who succeeds the tenant for life before the lease has been granted in pursuance of the contract, can effectually exercise such power by granting a lease in performance of the deceased tenant for life's contract (*Davis* v. *Harford*, 22 Ch. D. 128).

Remainder-men lying by and allowing tenant to expend money.

And it appears that the principle on which the Court interferes in cases of part performance of contracts, and establishes them against owners in fee, on the ground that it would be inequitable to allow the Statute of Frauds to be pleaded, would not apply to remaindermen (3 D. M. & G. 33). But it would be otherwise if, after the death of the tenant for life, the remainderman were to lie by and allow the tenant to carry out improvements and expend money (*Stiles* v. *Cowper*, 3 Atk. 692; *Shannon* v. *Bradstreet*, 1 S. & L. 73; *Hope* v. *Ld. Cloncurry*, 8 I. R. Eq. 555; *Kennan* v. *Murphy*, 6 L. R. Ir. 108; 8 *ib.* 285). In *Shannon* v. *Bradstreet* the remainderman came of age in 1792, but took no step to avoid the lease until 1801, and permitted the tenant to enjoy during all the intermediate time, and admitted that he knew of the agreement, but considered it not binding on him

as remainderman: he never told the tenant so, but allowed him to continue in possession and lay out money in improvements: the lease was held binding on him.

Lessee has no claim against estate of tenant for life, except on any express covenants.

Lord Redesdale also refused to allow him to turn round the lessee to seek compensation against the assets of the tenant for life, on the ground that he had lain by for too long a period, and was not then to be allowed to vary the rights of others.

But it seems that, in the absence of any covenant for quiet enjoyment or the like, by the tenant for life, the lessee would have no remedy against his estate by way of damages: that would be a decree merely for damages and not compensation for the benefit the tenant for life's estate had received: for it is the estate of the remainderman that is benefited (*Blore* v. *Sutton*, 3 Mer. 237; and *Stamford* v. *Omly*, cited 1 S. & L. 65).

But the lessee can recover damages on the lessor's covenants, if any such were entered into (*Lock* v. *Furze*, L. R. 1 C. P. 441). In *Vernon* v. *Ld. Egmont* (1 Bl. N. S. 554), a tenant for life had granted leases not in conformity with his power, and his lessees had expended money and paid fines: he then died, having made the next tenant for life his residuary legatee. It was held that before the residue was paid over to the legatee, he must either confirm or procure to be confirmed the leases, or otherwise indemnify the executor against all claims and costs in respect thereof.

Specific performance of contract to lease against donee of power.

14. Although Lord Redesdale, in *Harnett* v. *Yielding* (2 S. & L. 549), refused to decree specific performance of so much of an agreement to grant a lease as was within the terms of the power, it seems to be the better opinion that—

> If there be a *bonâ fide* contract to grant a lease under, but in excess of, the power, the interest of the tenant for life shall be bound to the extent to which he is able to bind it.

In *Dyas* v. *Cruise* (2 J. & L. 460), a tenant for life, with power to lease at the best rent, agreed to demise for a term warranted by the power, but at a rent which appeared afterwards not to be

the best rent. Lord St. Leonards decreed partial performance, and directed the tenant for life to demise to the extent of his interest. He said (p. 487) that Lord Redesdale, in *Harnett* v. *Yielding*, had refused partial performance, on the ground that the lessee knew the party had only a limited power of leasing and intended to execute it, and that there was no mutuality. "I doubt whether that can be maintained as the law of the Court, when there is no fraud in the transaction. If there is a *bonâ fide* intention to execute the power, and that contract cannot be carried into effect, I do not see why the interest of the tenant for life should not be bound, to the extent he is able to bind it, unless there be some inconvenience." In *Graham* v. *Oliver* (3 B. 128), the Master of the Rolls, alluding to the difficulty in these cases, said that the Court had thought it right in many cases to get over these difficulties for the purpose of compelling parties to perform their agreements, and that it was right they should be compelled to do so, where it could be done without any great preponderance of inconvenience. If, therefore, it had appeared in the case before him that the lessee was aware that the lease was to be made to him by means of the execution of a power, then, although the rent were not strictly the best, yet he should have been of opinion that, it being a fair transaction, the lessee would be entitled to a performance of the contract to the extent of binding the life estate of the lessor: as in *Lord Bolingbroke's case* (cited 1 S. & L. 19, n.), where an incumbent contracted with a tenant in tail in remainder for the purchase of the advowson, and on the faith of that contract, built a better house on the glebe: afterwards the person in whom the life estate was vested refused to join in making a tenant to the *præcipe*, in order that a recovery might be suffered; and, consequently, no sufficient conveyance could be made of the advowson. But Lord Thurlow held the purchaser entitled to a partial performance of the contract; for that on the faith of it he had expended money on the glebe; (see, too, *Butler* v. *Powis*, 2 Coll. 156; *Leslie* v. *Crommelin*, 2 I. R. Eq. 134). It will be observed that these cases relate to specific performance at the expense of the tenant for life, and out of his estate, and the partial leases granted were not in execution of

the power of leasing at all. But specific performance may be decreed of a contract to grant a future lease, and such lease may be granted under the power, if the covenantee can prove that at the time when the future lease is to come into operation the rent is the best rent that could be then obtained, and the covenants are the proper covenants then to be inserted (*Gas Light Co.* v. *Towse*, 35 Ch. D. 519; see *post*, Chap. XVII., p. 591). If the covenantee cannot prove this, he can no more have specific performance by means of an exercise of the power as against the tenant for life than he could as against trustees with similar powers, and such trustees are bound to exercise their discretion in the choice of a tenant, when the property falls into possession, and not many years before (*Moore* v. *Clench*, 1 Ch. D. 453).

Purchaser with notice is bound.

And a purchaser under a power of sale from a tenant for life is bound during the life-tenant's life by all the terms of a lease granted by such tenant for life under a power of leasing, although they be not authorized by the power, if he have notice of the lease; he is bound to do any act which his vendor might have been compelled to perform.

In *Taylor* v. *Stibbert* (2 Ves. jun. 437), a tenant for life with power of leasing granted leases for lives, and bound himself upon the dropping of a life to grant a new lease, with the same provision for renewal on the death of any person to be named in any future lease. He afterwards sold under a power of sale, and the purchaser had notice of the lease. Although the power was exceeded, it was held that the purchaser must specifically perform the covenant, if a life dropped during the lessor's life; (see the case observed on, Sug. Pow. 765-7, and Dart, V. & P. 997, 6th ed.). Lord St. Leonards considers the reasoning in Lord Rosslyn's judgment unsatisfactory, and says that the true ground upon which the decree is to be supported is that, as the tenant for life was personally bound by the covenant, and the purchaser bought with notice, and indeed subject to the leases, and took a sufficient estate to enable him to answer the obligations of the covenant, he was bound to do so in order to prevent the lessee from having recourse to the tenant for life to enforce

damages against him for breach of the covenant. This does not, however, appear to afford much satisfaction to the remainderman. If the purchaser were not bound by the lease, he would give full value for the estate; but, if he is bound, he deducts the amount of the depreciation caused by the existence of the lease; and the remainderman has no compensation, unless he run the risk of an action to set aside the sale.

Lord St. Leonards' explanation was adopted by the Court of Appeal in *Smith* v. *Widlake* (3 C. P. D. 10), where they held that the absence of any right to sue on the covenants enabled the purchaser in that case to disregard the invalid lease.

Statutory aid to defective leases. 12 & 13 Vict. c. 26.

15. The aid afforded in equity to leases granted under powers depended on the consideration whether the defect was one of form or of substance. The Legislature has, however, interfered and affords wider aid to defective leases under powers.

The preamble of 12 & 13 Vict. c. 26, states that, "Whereas, through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers: And whereas leases granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power: And whereas it is expedient that provision should be made for granting relief in the cases aforesaid, in manner hereinafter mentioned:

Leases invalid owing to deviation from terms of power deemed contracts in

"Sect. 2. It is enacted, That where in the intended exercise of any such power of leasing as aforesaid, whether derived under an Act of Parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which

equity for such leases as might have been granted.

is by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person, who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide* and the lessee named therein, his heirs, executors, administrators, or assigns (as the case may require) have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs, executors, administrators, or assigns (as the case may require) of a valid lease under such power to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power, and all persons who would have been bound by a lease lawfully granted under such power, shall be bound in equity by such contract: Provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease where the persons who would have been bound by such contract are willing to confirm such lease without variation.

Acceptance of rent.

"3. The acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease. (This section is repealed by 13 Vict. c. 17, *infra*.)

Leases invalid at granting valid if lessor continue owner until he could grant.

"4. Where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect and be as valid as if the same had been granted at such last-mentioned

time and all the provisions herein contained shall apply to every such lease.

"5. When a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise), cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall for the purposes of this Act be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease. What is an intended exercise of a power.

"6. Nothing in this Act contained shall extend or be construed to prejudice or take away any right of action or other right or remedy to which but for the passing of this Act the lessee named in any such lease as aforesaid, his heirs, executors, administrators, or assigns, would or might have been entitled under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry or other right or remedy to which but for the passing of this Act the person granting such lease, his heirs, executors, administrators, or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled for or by reason of any breach of the covenants, conditions, or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators, or assigns, to be observed and performed. Saving rights of lessors and lessees under covenants.

"7. This Act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital, or charitable foundation, or to any lease where before the passing of this Act the hereditaments comprised in such lease have been surrendered or relinquished or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease, and shall not prejudice or affect any action or suit already commenced and now pending in any Court of Law or Equity, but every such action and suit may be proceeded with and such relief had therein as if this Act had Act not to extend to certain leases.

not passed." As to ecclesiastical leases, see Bacon, Abr. tit. "Leases," E. F. G. H.; Co. Litt. 44 b, 45; 5 Ch. D. 178.

13 Vict. c. 17. By 13 Vict. c. 17 it is enacted that the 3rd section of the last-mentioned Act be repealed.

"2. Where, upon or before the acceptance of rent under any such invalid lease, as in the Act (12 & 13 Vict. c. 26) mentioned, any receipt, memorandum, or note in writing confirming such lease is signed by the person accepting such rent, or some other person thereunto by him lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

Where reversioner is willing to confirm.

"3. Where during the continuance of the possession taken under any such invalid lease, as in the Act (12 & 13 Vict. c. 26) mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized; and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid."

Intention of these Acts.

16. These enactments do not apply to leases granted by a mere stranger to the leasing power (*Ex parte Cooper*, 34 L. J. Ch. 373, 377, where the lease of freehold property was granted by the executors of the surviving trustee—"a perfect stranger to the property and a perfect stranger to the power, a person to whom not only no power of leasing was granted, but who was never intended to have any power of any kind").

It appears to have been assumed in *Hallett* to *Martin* (24 Ch. D. 624), that these Acts apply to leases by trustees. The

phraseology would seem to point to leases by tenants for life only; but leases by trustees are as much within the mischief intended to be cured by the Act as leases by tenants for life. For the reasons stated at p. 345, *ante*, it is submitted that the Acts apply to leases granted under the powers of the Settled Land Acts and the Settled Estates Act.

It may be doubted whether the word "lease" in the Acts includes an agreement for a lease. It has been held not to do so in the 14th section of the Conveyancing Act, 1881 (*Swain* v. *Ayres*, 21 Q. B. D. 289; *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220). See now the Conv. Act of 1892, s. 5.

As to *bona fides* and entry mentioned in the 2nd section of the earlier Act, in *Moffett* v. *Lord Gough* (1 L. R. Ir. 331), the Lord Chancellor (Ball) held that a lessee who had given up an old lease and continued in possession under a new one, had not "entered" within the meaning of the Act; the L. J. Christian, on appeal, thought this too narrow a view; but he came to the conclusion that the lease could not be aided on the ground that the lease was not *bonâ fide*. "If the donee of the power knowingly, and, if knowingly, wilfully, ignores the two most substantial safeguards provided by the donor for the protection of the remainderman, viz., that the lease shall not be in reversion, and that the rent shall be fair and improved—can that lease be said to be made *bonâ fide?* I venture to think not. Again, the statute says that the lessee shall be entitled to a valid lease under the power to the like effect as the invalid lease, save so far as any variation may be necessary in order to comply with the terms of such power. What is the force of these latter words? Can any lease be within the statute if there be a defect in substance which is incapable of being made good by the variation? Again, I think not."

The intention of sect. 4 of the first Act is to bring leases under powers to some extent within the rule of law that "the interest when it accrues feeds the estoppel" (*Doe* v. *Oliver*, 2 Sm. L. C.). Thus, in *Rawlyn's case* (4 Co. Rep. 52), C. demised land, not his own, to W. for six years. R., the true owner of the land, demised it to C. for twenty-one years; and

C. re-demised it to R. for ten years. It was resolved that the lease by C., when he had nothing in the land, was good against him by conclusion, and that when R. demised it to him, then was his interest bound by the conclusion: and that when C. re-demised to R., R. was also concluded.

Under the last words of sect. 4 it seems that if before acquiring the power the grantor make a lease at variance with the terms of the power, the lease would, in the event of the grantor acquiring the power, operate as a valid contract for a lease, assuming *bona fides* and entry by the lessee (Davidson, iii. 518).

Distinction between void and voidable leases.

Independently of these statutes, the rule of law is that a *voidable*, but not a *void*, lease may be confirmed by acceptance of rent. A confirmation may make a voidable or defeasible estate good, but it cannot work upon an estate that is void at law (Co. Litt. 295 b).

The question whether a lease is void or voidable only turns upon the nature of the lessor's estate.

Mr. Hargrave, in his argument on the Villier's estate case, states that leases for years derived out of an *estate of inheritance* are voidable only; but being derived out of an *estate of freehold* merely are void. It is in consequence of this distinction that leases for years by bishops or tenants in tail are more available than those by parsons or prebends; the two former having an inheritance, the two latter having no more than a freehold. Mr. Justice Doderidge in his commonplace book states two positions, which being literally translated from the law French are in these words: "Acceptance of rent on lease for years which is derived *out of a freehold* will not make the lease good after the death of him on whose life the freehold is. Acceptance of rent reserved on a lease derived *out of inheritance* makes the lease good" (Harg. Jur. Arg. 1, 132).

As to leases by bishops and parsons, see Bacon, Abr. tit. Leases, G. and H., and *Herreyong's case*, Dyer, 46 a; *Hodgeskins* v. *Tucker*, *ib.* 239 a.

17. The rule may be stated as follows:—

Apart from the statutes 12 & 13 Vict. c. 26,

and 13 & 14 Vict. c. 17, no acceptance of rent by a remainderman can set up a void lease under a power.

"Where a lease made by a tenant for life is void as being bad from not conforming to a power, nothing done afterwards will amount to a confirmation. Where it is voidable only, acceptance of rent with other circumstances may be a confirmation; acceptance of rent and standing by while improvements were making, would be material; but if leases are void, there is no case either in law or equity by which compensation for improvements can be compelled" (*Bowes* v. *East London Waterworks*, Jac. 324, 331; *Robson* v. *Flight*, 4 D. J. & S. 608). And if the remainderman has only a limited interest, no acts of confirmation of a voidable lease by him can bind those in remainder after him (Jac. 332; and see *Hope* v. *Ld. Clonearry*, 8 I. R. Eq. 555; *Lowe* v. *Swift*, 2 B. & B. 529; *O'Fay* v. *Burke*, 8 Ir. Ch. R. 225). Lord Eldon founds his judgment in the case before him on the fact that the lessees had notice by their own lease, and if it were possible for a lessee to obtain the legal title without notice, his title would prevail: but a purchaser or lessee cannot shield himself from notice, or the effects of it, by refraining from inquiries as to title, whether under contract or otherwise (*Jackson* v. *Rowe*, 2 S. & S. 472, 475; *Jones* v. *Smith*, 1 Ph. 255); and the Vendor and Purchaser Act has made no difference as to this (*Patman* v. *Harland*, 17 Ch. D. 353). Acceptance of rent as such, or of any service reserved by the lease, operates as an admission by the remainderman receiving it that the lessee is his tenant and entitles him to notice to quit (*D.* v. *Watts*, 7 T. R. 83; *D.* v. *Taniere*, 12 Q. B. 998; *D.* v. *Morse*, 1 B. & Ad. 365).

The general rule is, that if a party occupy and pay rent under an agreement for a term, then although such agreement may not operate to create the proposed term, either in consequence of its not amounting to a lease (*Richardson* v. *Gifford*, 1 A. & E. 52), or not being a good execution of a power (*Beale* v. *Sanders*, 3 Bing. N. C. 850), yet the party so occupying and

paying rent is considered as holding upon all the terms of the agreement not inconsistent with a tenancy from year to year, such as the obligation to repair and the like (2 Sm. L. C. 9th ed. 112).

Accordingly, where a lease warranted by a power, and containing a covenant for perpetual renewal, is granted by a tenant for life, the reversioner does not, by accepting for many years after he came into possession the rent reserved upon the lease, confirm it, so as to make the covenant for renewal binding upon him (*Higgins* v. *Lord Rosse*, 3 Bl. 112); and it is in each case a question of fact whether a term contained in the tenancy between the tenant for life and the lessee is adopted into the new contract created by acceptance of rent by the remainderman. If such a tenant continues to hold under the remainderman, and nothing passes between them except payment and receipt of rent, the remainderman is not bound by a term of the former tenancy which was not known to him and is not in accordance with the custom of the country (*Oakley* v. *Monck*, L. R. 1 Ex. 159).

Effect of statutes.

The combined effect of the rule of law and the statutes above mentioned appears to be as follows:—

The effect of the original Act *before the repeal of s.* 3 is that the lessee under an invalid lease granted in the intended exercise of a power, became, on the mere acceptance of rent by the remainderman, tenant from year to year on the terms of the lease, with a right to require either a confirmation of the contract or a lease in accordance with the power, the remainderman having no option to require a lease in accordance with the terms of the power.

The effect of the original and Amendment Acts is, that the mere acceptance of rent, without the memorandum mentioned by section 2 of the Amendment Act, makes the lessee tenant from year to year on the terms of the void lease, with the right to demand a lease either in accordance with that contract or with the terms of the power, at the option of the remainderman; but if the remainderman is willing to confirm the contract without variation, the lessee cannot insist on having a lease in accordance with the terms of the power, but is bound to accept such confirmation. The acceptance of rent, coupled with the

memorandum mentioned in section 2 of the Amendment Act, operates as a confirmation of the lease; (and see Sug. Pow. 751; 3 Davidson, 420; S. L. Act, 1882, s. 12).

18. Sales under ordinary powers of land apart from the timber, or reserving the minerals, are invalid, and cannot be aided in equity. Sale of land apart from timber.

In *Cockerell* v. *Cholmeley* (1 Cl. & F. 60; 1 R. & M. 418; 10 B. & C. 564; *Cholmeley* v. *Paxton*, 3 Bing. 207), estates were vested in trustees and their heirs to the use of A. for life, without impeachment of waste, with remainders over, and the trustees had a power of sale with the consent of A.: they purported to exercise it by selling the estate apart from the timber, which was valued, and the purchase-money paid to A.: the power was held to be badly executed both at law and in equity.

To obviate this, it is provided by 22 & 23 Vict. c. 35, s. 13, that where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the Court shall direct, and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court shall be entitled thereto, the said sale ought to be established: and upon such payment and settlement being made accordingly the Court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him. 22 & 23 Vict. c. 35, s. 13.

It will be observed that this enactment does not authorize contracts like that in *Cockerell* v. *Cholmeley*: it merely enables

the Court to aid the defective execution of the power, if it shall think fit, at the purchaser's expense. The 16th section of 40 & 41 Vict. c. 18, authorizes sales by the Court of land and timber (not being ornamental timber) apart.

Sale of land apart from minerals.

19. In *Buckley* v. *Howell* (29 B. 546), Lord Romilly held that the ordinary power of sale was not well exercised by a sale of the land, reserving the minerals. And the late Master of the Rolls, in Chambers (*Re Brooks and Higham*, 18th July, 1877), held that the same rule applied to a partition.

Accordingly, it was enacted by 25 & 26 Vict. c. 108, that "every trustee or other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange or partition, the minerals with or without such rights or powers, separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals or (as the case may be) the undisposed of land. But this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition without the necessity of any further or other application to the Court.

"Every trustee or other person" includes mortgagees (*Re Beaumont*, 12 Eq. 86; *Re Wilkinson*, 13 Eq. 634). The *cestuis que trust* entitled should be served (*Re Broom*, 11 W. R. 19; *Re Palmer*, 13 Eq. 408); and V.-C. Wickens said that mortgagees subsequent to the petitioning mortgagee need not (12 Eq. 86). But in *Re Hirst* (45 Ch. D. 263), North, J., required the mortgagor to be served.

And where trustees have power of sale with consent of the tenant for life, the petition should be served on the tenant for life, and not on the remaindermen (*Re Pryse*, 10 Eq. 531; *Re Nagle*, 6 Ch. D. 104).

The order has been made generally and without reference to any particular sales (*Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, 16 Eq. 237).

It has been held that under s. 124 of the Lunacy Regulation Act, 1853, the Court has power to make an exchange of the lunatic's land without the minerals under it (*Re Dicconson*, 15 Ch. D. 316; and see Lunacy Act, 1890, s. 120).

Under s. 17 of the S. L. Act, 1882, a sale, exchange, partition, or mining lease may be made with or without an exception of mines and minerals.

Under s. 19 of 40 & 41 Vict. c. 18, on a sale of settled land by the Court, minerals may be excepted and rights reserved.

CHAPTER VIII.

EXCLUSIVE APPOINTMENTS.

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The law relating to exclusive appointments has been much modified by legislation. The first five paragraphs of this chapter must be read in connection with, and subject to, the enactments stated in the concluding paragraphs.

Definition.

1. An exclusive power, or power of selection, is a power of appointment among a class which authorizes the donee to select one or more of such class to the exclusion of the others. A non-exclusive power, or power of distribution, authorizes the donee to distribute the property among the class in such shares and proportions as he pleases, but not so as to exclude any object entirely. An exclusive power in a marriage settlement of personalty usually takes the form of a declaration, that the trustees shall stand possessed of the fund in trust for all or such one or more exclusively of the others or other of the children of the marriage as the donee of the power shall appoint. In settlements of real estate, the power is usually created by direct limitation to the use of the child or of all or such one or more, exclusively of the others or other of the children of the marriage, as the donee of the power shall appoint.

What words create exclusive powers.

2. Each case must depend on the intention expressed in the particular instrument creating the power: no general rule can

be laid down, except perhaps that the words "all and every" are mandatory and make it necessary that each object should have a share (5 Ves. 857), and that "such" authorizes exclusion, unless a contrary intention appear; (approved by Jessel, M. R., in *Re Veale*, 4 Ch. D. 64, and by Hall, V.-C., in *Chamberlain* v. *Napier*, 15 Ch. D. 634).

Instances of non-exclusive powers.

In the following cases, it was held that the terms of the several powers did not authorize exclusive appointments. In *Wilson* v. *Piggott* (2 Ves. jun. 351), the trust fund was directed to be paid "among all and every the child and children other than an eldest or only son," as the survivor of A. and B. should appoint.

In *Bulteel* v. *Plummer* (6 Ch. 160), the trust was to transfer 4,000*l.* "unto and amongst all and every the son and sons, daughter and daughters of G. T. P. and L. P. and the children of such sons and daughters as should be dead leaving issue," as G. T. P. and L. P. should appoint; (and see *Alloway* v. *Alloway*, 4 Dr. & War. 380; *Garthwaite* v. *Robinson*, 2 Sim. 43; *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708; *Lawlor* v. *Henderson*, 10 I. R. Eq. 150; *Donoghue* v. *Brooke*, 9 I. R. Eq. 489).

In *Strutt* v. *Braithwaite* (5 De G. & Sm. 369), there was a direction to trustees to employ the rents and profits of real estate "towards the maintenance and education of all and every the child or children" of J. S. and S. S., and on their attaining twenty-one, "to convey the same premises unto such child or children in such manner shares and proportions and for such uses estate and estates" as J. S. and S. S. should jointly appoint. "Such" was read "the said," and the power was held not to warrant an exclusive appointment.

In *Robinson* v. *Sykes* (23 B. 40), the power was to appoint "unto and amongst such child or children of the marriage, or unto and amongst the issue of such child or children in case such child or children should be then dead leaving issue in such shares and proportions as A. should think fit": this was held not to authorize an appointment to some of the issue exclusively.

In *Re David* (Joh. 495), the words were "to and among such

of the testator's children as should be living at A.'s death, in such shares as A. should appoint; (and see *Burleigh* v. *Pearson*, 1 Ves. sen. 281; and *Ward* v. *Tyrrell*, 25 B. 563; 27 L. J. Ch. 749).

Contrary intention.

Although the words of the power may not, taken alone, authorize an exclusive appointment, yet the intention that exclusion should be authorized may be collected from the whole scope of the instrument.

In *Burrell* v. *Burrell* (Ambl. 660; 5 Ves. 860), the testator gave all his real and personal estate to his wife, to the end that she might give his children such fortunes as she should think proper, or they best deserve; to whom he charged his sons and daughters to be dutiful and obedient, and loving and affectionate to each other. The wife appointed to all the children, but gave one an illusory share. Lord Camden was of opinion that these words were so ample, that if she thought fit to give nothing to one, she might so execute her power. Lord Alvanley says of this (5 Ves. 860), "I will not say what my own opinion would have been. I am willing to subscribe to that of Lord Camden on such a doubtful question, being perfectly satisfied that in setting aside these appointments, criticising upon the words 'to and amongst &c.,' and the rule as to illusory shares, the Court goes against the intention. I must therefore think that under the words of that will Lord Camden thought the wife might have given the whole to one child, and had a right to exclude any who in her opinion did not want it." In *Mahon* v. *Savage* (1 S. & L. 111), a testator bequeathed a legacy to his executors to be distributed among his poor relations or such other objects of charity as should be mentioned in his private instructions. No instructions were left, and Lord Redesdale was of opinion that the executors had a discretionary power and need not include all the testator's poor relations.

Instances of exclusive powers.

In *Kemp* v. *Kemp* (5 Ves. 857), the Master of the Rolls mentions certain cases in which exclusive appointments have been authorized. In *Swift* v. *Gregson* (1 T. R. 432), the words were "to and for the use and behoof of such child or children of J. G." as he should appoint. In this case Ashurst, J., seems to

have thought there might be a distinction between real and personal estate (*sed qu.*). In *Spring* v. *Biles* (1 T. R. 435, n.), "to and amongst such of my relations as shall be living at the time of my decease in such parts, shares and proportions," as A. should think proper. In *Thomas* v *Thomas* (2 Vern. 513), "to one or more of his children." *Tomlinson* v. *Dighton* (1 P. W. 149), "to any of his children." *Macey* v. *Shurmer* (1 Atk. 389), "amongst all or such of his children." *Liefe* v. *Saltingstone* (1 Mod. 189), "to such of my children." In *Re Veale* (4 Ch. D. 61; 5 Ch. D. 622), the words were "to and amongst my other children or their issue in such parts, shares and proportions, manner and form," &c.: this was held to give a power of selection not merely between children or issue, but also between the individuals of the class. In *Chamberlain* v. *Napier* (15 Ch. D. 614), the words were "for such child or children, and if more than one in such shares," &c. All these words were held to show a manifest intention to give a power to appoint to any one child; (and see *Turner* v. *Bryans*, 31 B. 303). And it seems that a power to appoint "to one of the sons of A. as B. should direct," would not merely authorize, but compel an exclusive appointment to one only: *per* Lord Alvanley in *Brown* v. *Higgs* (4 Ves. 717).

3. Apart from 37 & 38 Vict. c. 37, an appointment under a non-exclusive power, which exhausts the property subject to the power without giving a share to all the objects, fails entirely.

When exclusive appointments fail *in toto*, and when in part.

The same rule applies if several appointments, to take effect together, are made by one and the same instrument to different persons, by which the whole fund is exhausted without a share being given to each of the objects.

In *Bulteel* v. *Plummer* (6 Ch. 160), a testatrix, having power to appoint a fund by will amongst all and every of her children and their children, covenanted to appoint 2,500*l.* to one child. By her will she accordingly appointed 2,500*l.* to that child, and appointed other parts of the fund to other objects of the power,

and bequeathed and appointed all the estate over which she had a disposing power to another object: these appointments exhausted the fund without providing a share for all the objects. It was held that all the appointments failed. Lord Hatherley said, "This is an instrument which at once takes effect as to all the objects; the whole fund is given to the several objects mentioned, one of whom is the last. It appears to me that it would be impossible for us, on any collocation of the persons, to say that because she has last named one particular person, therefore all the other appointments are good; and this one being void, the rest are to stand."

But the rule does not apply to appointments of portions of property made at different times. If an appointment of part has been made, which is perfectly good, and there is left residue enough to give something to all the other objects of the power, then a gift made by deed to others may be perfectly good and the appointor may go on until he comes to the last, which may be bad. The others are perfectly good, and are not made bad because there is a bad disposition of the rest of the fund (*ibid.*; and see *Wilson* v. *Kenrick*, 31 Ch. D. 658; *Mapleton* v. *Mapleton*, 4 Dr. 515; 28 L. J. Ch. 785).

By setting aside the last appointment, which in the case supposed, is an independent one, part of the fund is left free to go as in default of appointment, and therefore none of the objects are excluded. The power may be well exercised by several appointments, although each appointment does not give something to all the objects, if all the objects ultimately take a share either by, or in default of, appointment (*Bristow* v. *Ward*, 2 Ves. jun. 336; *Wilson* v. *Piggott*, *ib.* 351; *Young* v. *Lord Waterpark*, 13 Sim. 199).

Appointments bad in their inception made good by event.

It is well established that appointments, in execution of non-exclusive powers, which exhaust the whole fund without giving a share to all the objects, may be rendered valid by subsequent events; if part of the fund purported to be appointed fails, there is an end to the question of exclusive appointment.

In *Ranking* v. *Barnes* (33 L. J. Ch. 539), the donee of a non-exclusive power appointed by deed in 1830 two-sixths of the

trust fund to one of the objects; and in 1843, by two deeds poll, she appointed the residue to two others of the objects, assuming that the appointment of 1830 was valid. These three appointments exhausted the fund without including all the objects of the power. The appointment of 1830 was subsequently set aside as to one moiety thereof as being a fraud on the power. It was held that the partial failure of the appointment of 1830, by setting free a portion of the fund and leaving it to devolve as unappointed, removed all objection to the subsequent appointments on the ground of exclusiveness.

It would be the same if the appointments were by one and the same instrument, *e. g.*, by will. In *Bulteel* v. *Plummer* (stated *ante*, p. 365), Lord Hatherley doubted whether it was not possible to say that the appointment of 2,500*l.* was fraudulent and void, "the effect of which would be to make the other gifts good." And in the Court below (8 Eq. 585), V.-C. Malins held that the appointment of the residue was invalid, and that consequently the other appointments were good. On the other hand, in *Barry* v. *Barry* (10 I. R. Eq. 397), the M. R. is reported to have said that if an appointment is good at the time when it is made, subsequent events cannot make it bad; (see this case commented on, *ante*, p. 253).

It is not necessary, in order to establish an appointment of part of the property to one object under a non-exclusive power, that the appointor should appoint the residue to the other objects; it will be sufficient, if he leave it to devolve under the gift in default of appointment.

Hotchpot.

It is submitted that a hotchpot clause is usual, and would be inserted in any settlement made under the direction of the Court in pursuance of articles (*Alloway* v. *Alloway*, 4 Dr. & War. 380, 390; *Re Norcott*, 14 Ir. Ch. R. 315); notwithstanding what was said in *Lees* v. *Lees* (5 I. R. Eq. 558), and in *Wilkinson* v. *Nelson* (7 Jur. N. S. 480; 9 W. R. 393), a deed was rectified by inserting a hotchpot clause. But in executed instruments, no hotchpot clause can be implied; and accordingly, although the power be non-exclusive, an appointee of part of a fund will be entitled to a share of any unappointed part in the absence of

special directions as to hotchpot. The burden of proving that the gift over to all equally in default of appointment is not to take effect, lies on the party asserting it; it is not enough to show that, at the time of the execution of the deed, it was the intention of the donee that the appointee should have no more than the part appointed. It is necessary to go beyond that and show, by express words or by necessary implication, that the other objects should take something under the deed (*Wombwell* v. *Hanrott*, 14 B. 143; *Wilson* v. *Piggott*, 2 Ves. jun. 351; *Alloway* v. *Alloway*, 4 Dru. & War. 380; *Walmsley* v. *Vaughan*, 1 De G. & J. 114).

Onus, how discharged.

It is, however, open to the persons claiming in default of appointment to show (a) that the appointment is so worded as to contain not merely an express appointment to the immediate appointee, but an implied appointment to the other objects of the power; or (b) that the appointment is really conditional on the appointee claiming no part of the unappointed fund; or (c) that the appointee is estopped from claiming any share in the unappointed fund.

(a) *Foster* v. *Cautley* (6 D. M. & G. 55), is an illustration of the first class of cases, where the L. C. found an implied appointment in the words used; and *Re Alfreton* (31 W. R. 702), is a case where no such implication could be found. In that case lands were conveyed in 1842 to trustees on trust to raise after the death of M., or during his life with his consent, 12,000*l.* for the benefit of E. and L., daughters of M., in such shares as M. should appoint, and in default of appointment equally at twenty-one or marriage, to be paid to them at that age or time after the death of M., or by his consent in writing during his life. In 1844, M. appointed 4,000*l.* to be raised and paid to E. at once, and 1,000*l.* on his death "to the intent that the payment of the portion or portions of" E. might be accelerated. M. died without making any further appointment; and it was held that E. was entitled to share in the unappointed fund.

(b) In *Foster* v. *Cautley* (*supra*), the L. C. thought that the words "as and for her original share," and "in lieu of all claims

and demands to or for her original or principal share or interest in the trust moneys" would not have been enough to disentitle the appointee to share in the unappointed residue. It has been said, however, that there is a distinction between cases where the appointment is of property "*as* a child's share," and where it is "in lieu of a child's share." "Where a father appoints to a child a certain sum and says that he gives it as his share of the fund, he really says and does no more than he says and does when he makes the appointment. But when the father says that what he gives is to be in lieu of his share, the fair presumption is that he intended it as all the child should ever take" (*Armstrong* v. *Lynn*, 9 I. R. Eq. 186, 198; Sug. Pow. 285; *Clune* v. *Apjohn*, 17 Ir. Ch. R. 25). It is submitted that it is a question of construction in each case whether the appointment really imposes a condition on the appointee to take no share of the unappointed fund.

(c) It has been held that there is a distinction between cases where the appointment is made by a deed poll to which the child is no party, and cases where the appointment is made by deed *inter partes* to which the child is a party (*Armstrong* v. *Lynn*, 9 I. R. Eq. 186, 198).

In *Clune* v. *Apjohn* (17 Ir. Ch. R. 25), the appointments in question were made by indentures to which the appointees were parties: and one appointment was made and the appointee accepted it "as and for and in lieu and discharge of her share or portion"; the other was made and accepted by the appointee "as and for her share and proportion, and in lieu, bar, and full satisfaction of all claims which the appointee might have." The decision in this case appears to proceed on the ground of estoppel; (but see *Close* v. *Coote*, 7 L. R. Ir. 564).

Payments made, when final.

When a payment under an appointment has been once made, it is final, unless there is a hotchpot clause: and therefore, if payments on account are properly made in pursuance of appointments, and afterwards an unavoidable loss occurs, rendering the trust funds insufficient to pay all the appointees in full, the balance belongs to all the appointees in proportion to the unpaid amounts; and the payments rightly made on account

cannot be brought into hotchpot (*Re Bacon, Hutton* v. *Anderson*, 42 Ch. D. 559).

Two settlements with distinct hotchpot clauses.

If two distinct settlements are made on a marriage, each dealing with separate sums, and each containing a hotchpot clause, such clauses are read as distinct and separate clauses, and affect only the property comprised in the respective settlements (*Montague* v. *Montague*, 15 B. 565). Where the hotchpot clause does apply, everything, including life interests and reversionary interests, must be brought into account (*Rucker* v. *Scholefield*, 1 H. & M. 36; *Eales* v. *Drake*, 1 Ch. D. 217).

Everything is brought into hotchpot.

Interest.

Under the ordinary hotchpot clause, it is submitted that interest should be charged on any sums appointed and paid over before final division, as from the determination of any pending life interests, and not earlier. The intention is that the objects of the power should share equally *inter se*. If there is a prior life interest, and an appointment is made to an object and the life interest is released, the appointee gains nothing at the expense of the other objects during the lifetime of the tenant for life: they have been deprived of nothing which they would otherwise have had during that period, and can only require the appointee to account for interest as from the date of the life tenant's death; (cf. *Field* v. *Seward*, 5 Ch. D. 538; *Rees* v. *George*, 17 Ch. D. 701; *Stewart* v. *Stewart*, 15 Ch. D. 539; *Hilton* v. *Hilton*, 14 Eq. 468).

What is an exclusive appointment.

4. It is usually clear whether an appointor has or has not entirely excluded any one object of the power; but the question may arise whether there has been any intention to appoint to all the objects or not; this will depend on the rules already stated with regard to the execution of powers; but two cases of a somewhat peculiar character may be here noticed.

In *White* v. *Wilson* (1 Drew. 298), a married woman appointed the residue of a fund, over which she had a general power, to her children, A., B., and C., in such manner as D. should by will appoint. D. by his will in exercise of the power appointed 500*l.* to A., ( ) to B., "he having been already more than sufficiently provided for," and the residue to C. This appointment was held bad. V.-C. Kindersley thought it by no means

clear that D. did not intend to appoint something to B., but as nothing had been actually given, he could not hold that a power to appoint to three authorized an appointment to two.

In *Gainsford* v. *Dunn* (17 Eq. 405), a testatrix, a spinster, having power to appoint certain funds by will in favour of A., B., C., D., and E., in such parts, shares, and proportions as she might think fit, and having no other power, by her will gave legacies of 5*l.* each to A., B., and C., and all the residue of her property, of whatever kind and wheresoever situate, and over which she had any power of appointment, to D. and E. The testatrix had some personal estate of her own. The Master of the Rolls said, that where you find a legacy followed by a gift of the residue of real and personal estate, the word residue is considered to mean that out of which something given before has been taken, and the result is to make the residue a mixed fund and to charge the legacies proportionally and rateably upon the mixed fund. He considered that doctrine was applicable to appointments under powers, and that the legacies of 5*l.* were consequently payable partly out of the testatrix's own property and partly out of the fund appointed; and he accordingly held the power well exercised; (and see *Re David*, John. 495; *Disney* v. *Crosse*, 2 Eq. 592).

Illusory appointments.

5. Under the old law, before the statutory alteration next mentioned, when a power was given to appoint among a class in such parts or shares as the appointor should direct, it was held that the meaning of the person creating the power was, that the appointor should appoint a substantial share to each object of the power. This was not according to the literal wording of the power, but it made sense of it; because, if the appointment of a farthing would do, then, on the principle *de minimis non curat lex*, it would make every non-exclusive an exclusive power. This doctrine, however, was found inconvenient. No one knew exactly how much a substantial portion of the property was, and it was impossible to say without resorting to litigation, what the least sum was which the appointor was authorized to appoint. This inconvenience led to an alteration of the law, under the guidance of Lord

St. Leonards, and it was enacted that in future no appointment might be objected to on the ground of its being illusory, that is, on the ground of the smallness of the sum or share appointed, but the construction of the power was not altered. The consequence of this alteration has been this, that where the power is non-exclusive, if the appointor forgets to appoint a shilling or even a farthing to every object of the power, the appointment is bad, because someone is left out. But if some share, however small, be appointed or left unappointed to devolve upon all the objects, the appointment will be valid (17 Eq. 406).

11 Geo. 4 & 1 Will. 4, c. 46.

6. The statute above referred to enacted as follows:—(i.) No appointment which from and after the passing of the Act (16th July, 1830), shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to, or left unappointed to devolve upon, any one or more of the objects of such power; but every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder or in default of such appointment, take more than an unsubstantial, illusory, or nominal share of the property subjected to such power. (ii.) Provided that nothing in the Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any such power as aforesaid, which shall declare the amount of the share or shares from which no object of the power shall be excluded. (iii.) Provided also that nothing in the Act contained shall be construed, deemed, or taken at law or in equity, to give any other validity, force, or effect, to any appointment than such appointment would have had, if a substantial share of the property affected by the power had been thereby appointed to, or left unappointed to devolve upon, any object of such power.

Retrospective.

The statute operates retrospectively on powers existing at the time of, but executed after, the passing of the Act (*Reid* v. *Reid*, 25 B. 469, 480; where the appointor's will was dated in 1847).

7. The statute required a share, however small, to be given to or left undisposed of to devolve upon all the objects of the power (*Bulteel* v. *Plummer*, 6 Ch. 162). It has been considered that an appointment under a non-exclusive power of the whole property to some of the objects, with a gift over, in case any of them should die under age, or before marriage under age, of their shares to the other objects, was not valid under the Act (*Minchin* v. *Minchin*, 3 Ir. Ch. Rep. 167). But Lord St. Leonards says of this (Pow. 450), that it was not necessary to decide this point, and it seems to require further consideration. And in *Re Capon* (10 Ch. D. 484), Jessel, M. R., disapproved of the dictum, and held that an appointment in 1834 unto and amongst the objects of the power, "and the survivors and survivor of them equally, and if only one should survive the appointor, then to that one only," was valid. Appointment of contingent or reversionary interest.

The intention of the legislature in enacting that no share should be deemed illusory, but leaving it still obligatory on the appointor to give something to each object, seems to have been to make it certain in each case that the omission of any object was not an oversight. The most trifling amount is sufficient to satisfy the statute. Thus, in *Re Stone* (3 I. R. Eq. 621), the donee of a non-exclusive power appointed to one object all the lands and premises subject to the power, except the square yard of land therein mentioned, and appointed to the other object one square yard of the said lands in such part thereof as the first appointee should think fit. This was held good, the Court being of opinion that the legislature had authorized an appointment which is "illusory, unsubstantial, and nominal: in fact, a mere cipher." It would seem, therefore, that the appointment of a mere reversionary or contingent interest would be sufficient; all that is necessary is that something should be given.

8. Before the statute the donee of the power could not give a mere reversionary interest to any child; but he might give to one child a share for his own life, or for the life of another person, with remainder over to the other children, and he might cross the gifts from one to another, provided only that he The law before the statute.

gave to each a real substantial share in possession and not a mere nominal or reversionary interest (*per* Lord St. Leonards, *Alloway* v. *Alloway*, 4 Dr. & War. 387).

In *Lloyd* v. *Lever* (14 Sim. 645), where the appointment was before the Act, the Vice-Chancellor held that if a fund is given in trust for all and every the child and children of A. who shall be living at the time of her decease, in such parts or shares and in such manner as A. shall appoint, an appointment of successive life interests in the whole income of the fund is not an appointment to all the objects in shares. He apprehended that no appointment could be a good execution of such a power, unless it gave a share of the capital to each of the objects. For the law on illusory appointments before this statute, see Sug. Pow. 938.

9. The Act 37 & 38 Vict. c. 37, enacts, s. 1, "that no appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual, notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power." S. 2 provides "that nothing in this Act contained shall prejudice or affect any provision in any deed, will, or other instrument creating any power, which shall declare the amount or the share or shares from which no object of the power shall be excluded, or some one or more object or objects of the power shall not be excluded."

The Act of 1830 enabled an appointor to cut off any object of the power with a shilling: the Act of 1874 enables him to cut off the shilling also.

The Act of 1874 is expressed in words similar to those of the Act of 1830, and is therefore retrospective in that it applies to appointments made after the Act in exercise of powers created before the Act. It has, however, been held that the Act does

not apply to a will executing a power made before the Act, although the testator dies after the Act (*Moynan* v. *Moynan*, 1 L. R. Ir. 382). But a will made before the Act, and republished by a codicil after the Act, is within the operation of the Act (*Re Walsh*, 1 L. R. Ir. 320). The Act does not authorize the appointor to impose on any appointee a condition which is not within the terms of the power (*Butler* v. *Butler*, 7 L. R. Ir. 401).

CHAPTER IX.

ELECTION.

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Principle of election.

1. THE principle of election is that he who accepts a benefit under an instrument must adopt the whole of it, conforming with all its provisions and renouncing every right inconsistent with them (*Streatfield* v. *Streatfield*, 1 W. & T. L. C.).

Applies to all instruments.

The doctrine is applicable to all instruments, deeds as well as wills. "The general rule is, that a person cannot accept and reject the same instrument, and this is the foundation of the law of election, on which Courts of Equity particularly have grounded a variety of decisions in cases both of deeds and of wills, though principally in cases of wills, because deeds, being generally matters of contract, the contract is not to be interpreted otherwise than as the consideration which is expressed requires" (*per* Lord Redesdale, *Birmingham* v. *Kirwan*, 2 S. & L. 444, 449). In *Codrington* v. *Lindsay* (8 Ch. 578, affirmed L. R. 7 H. L. 854), Lord Selborne cites this rule with approbation, and says that it is illustrated as to cases of voluntary deeds by *Llewellyn* v. *Mackworth* (Barnard. 445), and *Anderson* v.

Abbott (23 B. 457); as to cases of contract for valuable consideration resting in articles by *Savill* v. *Savill* (2 Coll. 721), and *Brown* v. *Brown* (2 Eq. 481); and as to contracts for value completely executed by conveyance and assignment, by *Bigland* v. *Huddleston* (3 Bro. C. C. 285 n.); *Chetwynd* v. *Fleetwood* (1 Bro. P. C. 300); *Green* v. *Green* (2 Mer. 86); *Bacon* v. *Cosby* (4 De G. & Sm. 261); *Mosley* v. *Ward* (29 B. 407); and *Willoughby* v. *Middleton* (2 J. & H. 344). He also suggests (p. 586) that the principle of election, as applied to deeds, is that a person claiming under a deed shall not interfere by title paramount to prevent another part of the deed from having effect according to its construction; (and see *Sadlier* v. *Butler*, 1 I. R. Eq. 415). But cases of express condition must be distinguished: such are not cases of election at all (Sug. Pow. 577, and see 2 Ves. jun. 371).

Election applies to appointments under powers.

2. The doctrine of election applies to appointments under powers; it may be stated as a general rule that

> Where there is a direct appointment to strangers to the power, and a gift by the same instrument to the persons entitled in default of appointment, the latter will be put to their election (*Whistler* v. *Webster*, 2 Ves. jun. 367; *Re Brooksbank*, 34 Ch. D. 160; *Re Wheatley*, 27 Ch. D. 606).

In order to raise a case of election there must be an absolute direct appointment to the strangers; nothing short of that will be effectual; a mere condition annexed to an appointment to an object would be treated as an unwarranted attempt to restrict the interests of the real objects of the power, and would be rejected accordingly. The cases of *Carver* v. *Bowles* (2 R. & M. 301), and *Blacket* v. *Lamb* (14 B. 482), illustrate this and show that the first question is, are the words of appointment sufficient to vest the property absolutely in the objects of the power, with a superadded condition not warranted by the power, or do the superadded words in terms constitute an absolute unconditional appointment in favour of the strangers? If the former is the

case, no question of election can arise, because the object of the power is the only person who takes, and there is no conflict between him and any other person (*White* v. *White*, 22 Ch. D. 555). In that case a testator, with power to appoint settled lands to the children of his first marriage, appointed them to his eldest son, subject to charges in favour of his other children, some of whom were by a second marriage; and devised land and shares of his own to the same son, subject to the same charges so as to equalise the shares of all his children in all his property. Fry, J., held that a case of election arose; and this was followed in *King* v. *King* (13 L. R. Ir. 531), where the donee of a testamentary power of appointing land among his male issue devised certain of such lands to B. his eldest son "to be chargeable with 2,000*l.* borrowed for B.'s sole use," and gave legacies out of his own estate to all the other objects of the power (who were apparently also the persons entitled in default of appointment, though this is not stated in the report), and directed payment of his debts and legacies out of a fund made up of certain proceeds of sale and the sum of 2,000*l.* chargeable on the appointed estate. It was held that there was not an absolute appointment of the estate to B. subject to a void charge; but that all that was appointed was the estate minus 2,000*l.*, and that a case of election was consequently raised against the male issue other than B.

The appointor must assume to dispose of that which is not his: if he merely states that it has been disposed of in a particular way, and then proceeds to distribute his property on that assumption, and it turns out that he was mistaken, no case of election arises (*Lewis* v. *Lewis*, 11 I. R. Eq. 343; *Dashwood* v. *Peyton*, 18 Ves. 41; and see *Re Woodleys*, 29 L. R. Ir. 304). And he may show that he has appointed to the strangers to the power, only if and so far as he was lawfully entitled to do so, with a gift over to the objects if he could not effect his primary purpose. In such a case no question of election would arise (*Re Swinburne*, 27 Ch. D. 696; *Church* v. *Kemble*, 5 Sim. 525).

Appointment to strangers and gift to

Where a man having a power to appoint to A. a fund, which in default of appointment is given to B., exercises the power in

favour of C. and gives other benefits to B., although the execution is merely void, yet if B. will accept the gifts to him, he must convey the estate to C. according to the appointment (Sug. Pow. 578; *Tomkyns* v. *Blanc*, 28 B. 422; *Prescott* v. *Edmunds*, 4 L. J. Ch. O. S. 111). persons entitled in default.

If the donee of a power appoints in due form, without reserving any power of revocation, to A. an object of the power, and afterwards purports to revoke that appointment, or if he has reserved a power of revocation, but the original power has been by some means extinguished, and he purports nevertheless to exercise it—in either case, if by the same instrument he gives benefits to the original appointee, the latter will be put to his election. In *Cooper* v. *Cooper* (6 Ch. 15), Mrs. C. had a power of appointment among her children to be exercised before a certain period. Before that period she made a valid appointment and reserved a power of revocation. By her will, which did not come into operation until after the period during which her power existed, and was therefore an invalid execution of it, she purported to make a different disposition of the property subject to the power, and at the same time gave benefits to the original appointees. It was held that the latter were put to their election, and that the next of kin of one of them, who was dead, were also bound to elect. And this was affirmed in the House of Lords (L. R. 7 H. L. 53; and see *Pickersgill* v. *Rodger*, 5 Ch. D. 163). Revocation of absolute appointment, and gift to appointee.

If, prior to the Act 37 & 38 Vict. c. 37, the donee of a non-exclusive power of appointment among a class (to whom the property was limited in default of appointment) appointed exclusively to one object, and by the same instrument conferred benefits on the others, the latter were put to their election (Sug. Pow. 579). Exclusive appointment under non-exclusive power.

If the donee of a power improperly delegates it to another, and confers gifts by the same instrument on the persons entitled in default of appointment, they will be put to their election (*Ingram* v. *Ingram*, cited 1 Ves. sen. 259). Delegation.

The doctrine applies equally to the converse case of a revocation in excess of the power. In *Coutts* v. *Acworth* (9 Eq. 519), Revocation in excess of power reserv-

ed and gifts to appointee.

a fund was vested in trustees in trust for A. for life with remainders over, and there was reserved to the settlor a power of revoking the remainders over. The settlor by his will purported wholly to revoke the trusts of the settlement and gave benefits to A. It was held that A. was put to his election; (see, too, *Booker* v. *Booker*, 34 W. R. 346).

Limits of doctrine.

3. But if the donee of the power appoint the specific property subject to the power to strangers, and then appoint, devise, and bequeath all his property not thereinbefore specifically and absolutely appointed or bequeathed, to an object of the power, the latter will take the property subject to the power under the residuary appointment, and no case of election will be raised, although the residuary gift comprised property belonging to the testator absolutely. The rule is that—

> The doctrine of election is to be applied as between a gift under one instrument and a claim dehors that instrument and adverse to it, and is not to be applied as between one clause in an instrument and another clause in the same instrument.

In *Wollaston* v. *King* (8 Eq. 165), A. had power under her marriage settlement to appoint certain funds among the children of the marriage. A. by her will in execution of this power appointed a portion of the funds to child B. for life, with remainder (which was void), as he should by will appoint, and made a general residuary appointment of the settled fund, subject to all other appointments made thereof, to her daughters, to whom she gave benefits out of her own property by the same will. It was held that the daughters were not put to their election.

"It would seem a very strange thing that in construing the same instrument the Court, dealing with a clause in which a fund is expressed to be given partly to A. and partly to B., should hold that the gift to A. being void, the testator's intention is that B. should take the whole; and then, coming to another clause in which another fund is given to B. and no

mention of A. at all, it should hold that there is an implied condition that B. should give back part of that which it was the testator's intention that he should take" (*per* V.-C. James, 8 Eq. 174, and see *Wallinger* v. *Wallinger*, 9 Eq. 301; and cf. *Warren* v. *Rudall*, 1 J. & H. 1).

Election between successive appointments.

But there may be election between successive appointments in the same instrument. Where successive irrevocable appointments are made in favour of the same person, the latter appointment will be held to be in substitution for the former, if such appears to be the intention of the appointor, and the person in whose favour the appointments are made will be compelled to elect between them. In *England* v. *Lavers* (3 Eq. 63), A. having a power of appointment among children over a fund, appointed one-seventh to child E. on her marriage, and another one-seventh to child L. on her marriage; he afterwards executed a deed-poll, by which, without noticing the previous appointments, he gave one-sixth to E., another one-sixth to L., three-sixths to other children, and left one-sixth undisposed of. By his will he disposed of so much of the fund as was not then already appointed in favour of any of his children. The Master of the Rolls held that the deed-poll was in substitution for the former appointments. Of course the donee of the power could not interfere with these appointments, but when he executed the deed-poll, he meant to give each of his daughters one-sixth not in addition to, but in substitution for, the one-seventh he had already given; a case of election was accordingly raised. This is, however, rather a question of construction than of election, properly so called; *Re Keon* (3 L. R. Ir. 228) is to the same effect.

No election between gifts under a will and property subsequently taken under a derivative title.

And all questions of election must depend on the state of circumstances existing at the testator's death (*Lady Cavan* v. *Pulteney*, 2 Ves. jun. 544, 3 *ibid.* 384). In *Grissell* v. *Swinhoe* (7 Eq. 291), a testator who was entitled to a moiety of a fund, purported to bequeath the whole and to give one moiety thereof to the husband of the lady who was really entitled to one moiety in her own right. She survived the testator, and it was held that the husband, who had become entitled as his wife's administrator to her moiety, was not bound to elect between that and

the gift in the testator's will. This decision proceeded on the assumption that the legatee's title to the property did not exist at the death of the testator, but was a derivative title through the title of another person who was the true owner at the death (*Cooper* v. *Cooper*, 6 Ch. 15, 21).

No election if there be a valid appointment with improper conditions added.

4. There remains to be noticed an important exception to the application of the doctrine of election to appointments under powers, which is thus stated by V.-C. Wood:

> Where there is an absolute appointment to an object of the power, followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made, were swept out of it for all intents and purposes.

That is, not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election (*Woolridge* v. *Woolridge*, John. 63; *Carver* v. *Bowles*, 2 R. & M. 304). And, *à fortiori*, if the attempt to modify the appointee's interest be merely precatory, no case for election will arise. *Blacket* v. *Lamb* (14 B. 482); *Langslow* v. *Langslow* (21 B. 552); *Moriarty* v. *Martin* (3 Ir. Ch. R. 26), although mentioned with some approval by Lord St. Leonards (Pow. 582) cannot be taken to be now law (5 Eq. 49). So, too, it has been held that an executory gift over to a stranger on the death of an appointee is merely void, and raises no case of election (*Bate* v. *Willats*, 37 L. T. 221); but see *ante*, p. 302. The rule applies equally to cases where the testator, after appointing shares absolutely and then directing them to be settled, adds an express forfeiture clause if no such settlement be made (*King* v. *King*, 15 Ir. Ch. R. 479); but if he also gives legacies out of his own property and directs that such legacies shall be forfeited if the appointed shares be not settled, such a direction is valid and effectual (*ibid.*).

And the Court will regard with particular disfavour any modifications or conditions attached to an appointment which fail by transgressing the rules against perpetuity, or the like. It is not for the Court to aid attempts of that nature either by the application of the doctrine of election or otherwise (*Wollaston* v. *King*, 8 Eq. 175; *Re Warren*, 26 Ch. D. 208; *Re Handcock*, 23 L. R. Ir. 34).

The disappointed donee is entitled to compensation, not forfeiture.

5. Notwithstanding the opinion of Lord St. Leonards to the contrary (Sug. Pow. 576), it is clear that compensation, not forfeiture, is the right of the disappointed donee. See 1 Sw. 433, n., where, after a review of the authorities, the following conclusions are arrived at:—(i.) That in the event of election to take against the instrument, Courts of Equity assume jurisdiction to sequester the benefit intended for the refractory donee, in order to secure compensation to those whom his election disappoints. (ii.) That the overplus after compensation does not devolve as undisposed of, but is restored to the donee, the purpose being satisfied for which alone the Court controlled his legal right.

"The disappointed legatee may say to the devisee, 'you are not allowed by a Court of Equity to take away out of the testatrix's estate that which you would otherwise be entitled to, until you have made good to me the benefit she intended for me.' That means that no one can take the property which is claimed under the will without making good the amount; or in other words, as between the devisees and legatees claiming under the will, the disappointed legatees are entitled to sequester or keep back from the other devisees or legatees the property so devised and bequeathed until compensation is made. Thence arises the doctrine of an equitable charge or right to realise out of that property the sum required to make compensation" (*per* Jessel, M. R., 5 Ch. D. 173). It follows from this that the equity attaches to the estate. In *Pickersgill* v. *Rodger* (5 Ch. D. 163), the son of a testatrix predeceased her, but his estate took the benefit of the gifts in her will by virtue of sect. 33 of the Wills Act. Her will was so framed that a case of election would have been raised against the son if he had survived her; and it was held that the disappointed legatees were entitled to require the

son's estate to make good the benefits intended for them by the will. There was no longer any room for election, as the son with whom the power of election lay was dead; but the rights of the parties were determined on the footing that the son's estate took under the will (*ibid.*, p. 174; and see *Schroder* v. *Schroder*, Kay, 578; *Douglas* v. *Douglas*, 12 Eq. 617). The right to compensation is not lost by the death of the person who has elected, but may be enforced against his estate (*Rogers* v. *Jones*, 3 Ch. D. 688).

Testator must give property of his own, out of which compensation may be made.

Inasmuch as the doctrine of election depends on compensation, it follows that the donee of a limited power, who appoints to strangers, must confer benefits on the persons entitled in default of appointment out of property absolutely his own. "The doctrine of election cannot apply where there is no other subject but that to be appointed. It never can be applied but where, if an election is made contrary to the will, the interest that would pass by the will can be laid hold of to compensate for what is taken away; therefore in all cases there must be some free disposable property given to the person which can be made a compensation for what the testator takes away" (*Bristow* v. *Ward*, 2 Ves. jun. 336, 350; *Armstrong* v. *Lynn*, 9 I. R. Eq. 186). No case of election arises if the property out of which compensation is to be given is made inalienable by the instrument which is said to raise the case of election (*Smith* v. *Lucas*, 18 Ch. D. 531; *Re Vardon*, 31 Ch. D. 275; *Re Wheatley*, 27 Ch. D. 606; *Hamilton* v. *Hamilton*, (1892) 1 Ch. 396); or, if the person from whom compensation is claimed elects to take under the instrument, but has no assignable interest thereunder (*Re Lord Chesham*, 31 Ch. D. 466).

No election between two appointments under limited powers.

In *Re Fowler* (27 B. 362), a testator had two distinct exclusive powers, one over real estate the objects of which were his children and grandchildren, the other over personalty the objects of which were his children only. He appointed the realty among some of his children, and the personalty among some of the children and a grandchild: it was held that no case of election was raised in favour of the grandchild.

In *Re Aplin* (13 W. R. 1062), a testator had also two distinct

powers over two distinct funds; the objects of both powers were his children, and the fund was given to them in default of appointment; but only one of the powers authorized an exclusive appointment. The testator had five children, and he exercised both powers by his will, appointing under the exclusive power to child A., and under the non-exclusive power to children B. and C. The latter appointment was invalid, and A. was entitled to a share of the fund as in default of appointment. It was held that no case of election was raised against him.

The phrase "free disposable property," although now a classical term, is not quite free from ambiguity; does it mean necessarily property which belonged to the testator at his death and nothing else? If so, supposing that a testator gave A.'s property to B., and B.'s property to C., and A. elected to take under the will, B. could take the property devised to him and refuse to give effect to the gift to C. In such a case, does A.'s property become, for the purpose of election, part of the testator's "free disposable property" as soon as A. elects to take under the will?

The doctrine applies to property of all sorts.

6. Property of all sorts, freehold and copyhold, real and personal, is subject to the doctrine of election, and that whether the interests are immediate, remote, contingent, of value, or not of value (*Wilson* v. *Townshend*, 2 Ves. jun. 693).

And to all persons.

The doctrine also applies to the interests of persons under disability, as infants and married women (Sug. Pow. 577). In cases of infancy the period of election is either deferred until the infant attains twenty-one (*Streatfield* v. *Streatfield*, 1 W. & T. L. C.); or an inquiry is directed as to what would be for the infant's benefit (*Gretton* v. *Haward*, 1 Sw. 413, n. (*c*); *Re Lord Chesham*, 31 Ch. D. 472). And an order has been made in some instances for an infant to elect without any reference to chambers (*Lamb* v. *Lamb*, 5 W. R. 772; *Rushout* v. *Rushout*, 6 Bro. P. C. 89; *Blunt* v. *Lack*, 26 L. J. Ch. 148). As a general rule, in cases of disability by reason of coverture, an inquiry was directed as to what is for the benefit of the married woman (1 Sw. 413, n. (*c*); see *Cooper* v. *Cooper*, L. R. 7 H. L. 53).

Prior to 20 & 21 Vict. c. 57, a married woman could not elect

to relinquish a reversionary interest in personalty (*Williams* v. *Mayne*, 1 I. R. Eq. 519; disapproving of *Wall* v. *Wall*, 15 Sim. 513). It is submitted that, since the Married Women's Property Act, 1882, as regards property of which the married woman can dispose under that Act, she is now to be regarded as a *feme sole*: but questions of difficulty may still arise, such as are pointed out by the M. R. in *Smith* v. *Lucas* (18 Ch. D. 531). At p. 544 he says, "Then there arises another question: namely, can the wife during coverture elect? I think she can. I think that point is settled by *Barrow* v. *Barrow* (4 K. & J. 409), and one or two other cases. But can she during coverture elect so as to make herself bound by the contract, and deprive herself of the power of saying it shall not affect particular property, although that property is not in possession, and, so far as she is concerned, not in existence? In other words, can she, during the coverture, without the assistance of a court of equity, elect to this extent, that she will make the covenant binding on property thereafter acquired, although at the time she has no property at all? I am not aware of any case deciding the exact point; but looking at the current of authority, and not forgetting the recent case of *Pike* v. *Fitzgibbon* (17 Ch. D. 454), I think she cannot"; (see this passage explained by Pearson, J., 28 Ch. D. 424). It will be observed that the case suggested by Sir G. Jessel may still arise, because the Act does not apply where the married woman has no free separate property at all at the time of contracting; (see *ante*, p. 265; and *Re Queade*, 54 L. J. Ch. 786).

Effect of election.

7. If the person who elects be absolutely entitled, his election of course binds all who claim under him; but if he has only a limited interest, his election will not bind the rights of those entitled in remainder (*Ward* v. *Baugh*, 4 Ves. 623), and each of such remaindermen has a separate right of election, although Lord Northington was of opinion that the rule of election was to be confined to a plain and simple devise of the inheritance, and could not be extended to limitations (*Forrester* v. *Cotten*, Ambl. 388). This view, however, is not sanctioned by subsequent authorities (1 Sw. 408, n.; Sug. Pow. 578).

Election by tenant for life.

In *Fytche* v. *Fytche* (7 Eq. 494), a testator made several bequests to his wife, including some property to which she was entitled in her own right. The wife survived and received the benefits given by the will, but never elected, and died intestate leaving four next of kin, three of whom elected to take under the will, and the fourth, who was the widow's heir and administrator, against it. It was held that each of the next of kin had a separate right of election, and that neither the election of the majority, nor that of the heir and administrator, bound the others.

Election by married woman.

Election by a married woman binds both her real and personal estate in the hands of her heirs and representatives (*Ardesoife* v. *Bennet*, 2 Dick. 463), and she may elect without deed acknowledged (*Barrow* v. *Barrow*, 4 K. & J. 409). Her husband also is bound by her election in respect of personalty and realty held in trust for her; but he is not bound in respect of her legal estates in realty, or in respect of her personalty which vests in him in her right, for the right of election is an equitable doctrine and does not bind legal estates. It has been said (2 Ves. jun. 560) that "the election is hers and her husband's; a married woman may forfeit a conditional gift; the estate is in her; he takes in her right. If they disagree, it must be considered by the Court what is most for her interest; if he is considered as having an estate, that must rise and fall with hers; it is the most favourable supposition for him" (*per* C. J. De Grey). However, in *Brodie* v. *Barry* (2 V. & B. 127), the heiress-at-law of heritable property in Scotland was also legatee of personal property in England. Her ancestor devised his real estates in Scotland away from her; it was held that, although she was put to her election, the interest of her husband in his marital right could not be affected. This was admitted by Sir S. Romilly, who was counsel for the plaintiff.

In *Griggs* v. *Gibson* (1 Eq. 685), by the antenuptial settlement of A., certain real estate was limited (after the death of A. and his wife) to the use of all the children of the marriage as tenants in common in tail; and by the same settlement personal property was vested in trustees on trust for the same persons. A. by his

will gave 1,000*l.* per annum to B., one of his daughters, for her separate use for life, and declared that she should accept it in full for any share or interest that she might take under his marriage settlement. B. was a married woman, and her husband was insolvent; she elected, with her husband's concurrence, to take under the will and renounce all benefits under the settlement. It was held that, inasmuch as the personal estate was standing in the name of the trustees, and the fund was not in the wife's possession or in her husband's in her right, the interest of the husband and his official assignee failed entirely; for the wife's interest called on her to claim the property. But it was also held that her election could not defeat the interest of the official assignee in the real estate, but she was bound to give compensation, in electing against the settlement, to the extent of the realty which the assignee could have taken.

What is necessary to raise a case of election.

8. In order to raise a case of election, the testator must purport to dispose of property not his own (*Forrester* v. *Cotten*, Amb. 388). This requirement would be fulfilled by the donee of a limited power by an appointment to a stranger. It makes no difference whether he knew the property to be another's or supposed it to be his own, so long as the intention to dispose of the property is clear (*Whistler* v. *Webster*, 2 Ves. jun. 367, 370). On the same principle, it is immaterial whether the donee of a limited power expressly appoint to strangers with the full knowledge that his power is limited, or whether he erroneously suppose that his power is a general one, or comprises the persons to whom he appoints.

It is a rule in the construction of wills that a general devise or bequest does not include property which did not belong to the testator, in order to raise a case of election (1 W. & T. L. C. 6th ed., 409 *et seq.*, and cases there cited; *Synge* v. *Synge*, 9 Ch. 128; *Pickersgill* v. *Rodger*, 5 Ch. D. 163). It follows, therefore, that although a general devise or bequest since the Wills Act executes general powers, such a devise or bequest would not be taken to operate as an execution of a limited power in order to raise a case of election. And parol evidence is not admissible to show that the testator was under a mistaken apprehension that certain

property belonged to him, or that his power was general, and intended to include such property, or the property subject to such power, in his residuary gift (*ibid.* 413; Sug. Pow. 597). It is perhaps doubtful whether general words of gift and appointment would be held to execute a limited power in favour of a stranger in order to raise a case of election, if the testator had no other power. A limited power may be sufficiently referred to by general words of appointment, if the donee has no other power and the appointee is an object of the power (*Re Teape*, 16 Eq. 442, and *ante*, p. 183); but a mere reference to all powers in general terms seems too slight evidence of intention, if the appointee be a stranger.

Where testator has partial interest.

9. The difficulty of sustaining a case of election is always much greater where the testator has a partial interest in the property dealt with than where he purports to devise an estate in which he has no interest at all. Where the testator has some interest, the Court will lean as far as possible to a construction which would make him deal only with that to which he was entitled (*Howells* v. *Jenkins*, 2 J. & H. 706, 713; *Wintour* v. *Clifton*, 8 D. M. & G. 649; *Grissell* v. *Swinhoe*, 7 Eq. 291; *Booker* v. *Booker*, 34 W. R. 346; *Noel* v. *Noel*, 4 Dr. 624).

In *Tanner* v. *Elworthy* (4 B. 487), a father had a power of appointing leaseholds among his children, who were entitled thereto in default of appointment. The father renewed the leases in his own name, and by his will confirmed the settlement containing the power, and gave his freeholds and leaseholds to his son, and a legacy to his daughters. He had other leaseholds besides those subject to the power. It was held, that the latter did not pass by the will, and that no case of election arose.

In *Henry* v. *Henry* (6 I. R. Eq. 286), an estate called Dolphin's Barn was settled on trust for A.'s wife for life for her separate use, with remainder for the children of the marriage as the wife should appoint, and in default of appointment, for the children equally. By the death of one of his seven children, A. became entitled to one-seventh of the premises. By his will he gave "his property in Dolphin's Barn." This was held to mean merely his one-seventh, and not to show an intention to dispose of property not his own so as to raise a case of election; (and see

Padbury v. *Clark*, 2 Mac. & G. 298; *Fitzsimons* v. *Fitzsimons*, 28 B. 417; *Re Bidwell*, 32 L. J. Ch. 71). But in *Wilkinson* v. *Dent* (6 Ch. 339), where a testatrix was in possession of the entirety of an estate A., but was owner of only one moiety, and was mortgagee in possession of the other, a gift of "all and singular the mines of A., formerly the estate of S.," was held to operate on the whole estate, and not merely on her own moiety; for wills are to be construed reasonably, although parties are thereby put to their election.

10. No person can be made to elect without clear knowledge of the state of the properties (*Whistler* v. *Webster*, 2 Ves. jun. 371), and if election be made in ignorance it will not be binding (*Pusey* v. *Desbouverie*, 3 P. W. 315). But election need not be express; it may be implied: but the acts from which the election is to be implied must be done with a full knowledge of the elector's rights, and with the intention of electing (*Stratford* v. *Powell*, 1 B. & B. 1). The rule is thus stated by Lord Chelmsford.

Requisites to make a binding election.

> In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the nature of the inconsistent rights and of the necessity of electing between them. Second, an intention to elect, manifested either expressly or by acts which imply choice and acquiescence (*Spread* v. *Morgan*, 11 H. L. C. 615).

The doctrine of election is a rule not of law, but of equity; the knowledge of it is therefore not to be imputed as a matter of legal obligation (*ibid.*). It differs in this respect from the right of an infant to repudiate a contract on attaining twenty-one, which is a legal right (*Carter* v. *Silber*, (1892) 2 Ch. 278).

Knowledge of properties.

The person to elect is entitled to full particulars of the estates between which his choice is to be made, and the Court of Chancery will in almost all, if not in all, cases entertain a suit by a person put to election to ascertain the value of such estates

(*Butricke* v. *Broadhurst*, 1 Ves. jun. 171; *Wilson* v. *Thornbury*, 10 Ch. 248). "There is in almost all cases jurisdiction in equity to compel a final election, so as to quiet the title of those interested in the objects of which one is to be chosen; and the Court, as a condition of compelling such final election, secures to the person compelled to make it all the information necessary to guide him in doing so. It is also generally, though perhaps not universally, true that a person for whose benefit conditions will be imposed by the Court before it makes an order against him, can entitle himself to the benefit of the conditions by filing a bill and offering by it to submit to the order" (*per* V.-C. Wickens, *Douglas* v. *Douglas*, 12 Eq. 617, 637).

Evidence of knowledge.

But although, before an heir can be put to his election, he is entitled to know everything which concerns the situation and value of the property in reference to which he may be required to make the election, it is not necessary, when an heir has deliberately confirmed a devise of lands, which without his confirmation would be invalid, to adduce distinct evidence of his knowledge of his rights, in order to bind his representatives (*Dewar* v. *Maitland*, 2 Eq. 834).

Election may be implied.

Election may be implied from the state of circumstances.

"From a long course of dealing, from a series of acts, the Court is at liberty, as an inference of fact, to conclude that the party called upon to elect knew his rights, knew the value of both estates, and knew the rule of equity that he was bound to elect, and had, with that full knowledge, made his choice, with the intention of making it and of electing between the two estates. To justify the Court, however, in arriving at that conclusion, there must be a series of acts or dealings, consistent only with the knowledge which I have already mentioned, and with the deliberate intention to elect, or at least a series of acts or dealings that preponderates so strongly in the mind of the Court, that no person could come reasonably to any other conclusion; and the onus of proof must rest always upon the party who alleges that the knowledge existed, and that the deliberate choice was made" (*Sweetman* v. *Sweetman*, Ir. R. 2 Eq. 141, 153, *per* V.-C. Chatterton).

It is impossible to lay down any exact rule as to the acts from which election will be presumed. If a party being bound to elect between two properties, not being called upon so to elect, continues in the receipt of the rents and profits of both, such receipt affording no proof of preference cannot be an election to take one and reject the other (*Padbury* v. *Clark*, 2 Mac. & G. 298).

Mere lapse of time not enough.

No absolute inference can be drawn from mere length of time; but it must be from circumstances showing the intent of the party; receipt of rents or of personalty officially will not bind (*Butricke* v. *Broadhurst*, 3 Bro. C. C. 88; *Sopwith* v. *Maugham*, 30 B. 235).

In *Morgan* v. *Edwards* (13 Price, 782; 1 Bl. N.S. 401) it was held that it must be shown, in order to make mere acquiescence binding, that injury would now arise to third persons from rescinding it, and that it would be impossible to place them in other than a worse condition than they would have been in if the party had elected earlier: and secondly, that the elector knew that he had a right to elect; that is, that he knew not only the existence of the instrument, but the consequences of it on his rights. In *Brice* v. *Brice* (2 Moll. 21), the Lord Chancellor said: "There is no time limiting the right to elect, for all the circumstances of the case are to be taken together, and if they do not bring the case within Sir W. Grant's distinctions (in *Morgan* v. *Edwards*), the right of election continues, notwithstanding almost any given lapse of time"; (and see *Dillon* v. *Parker*, 1 Cl. & Fin. 303; *Worthington* v. *Wiginton*, 20 B. 67; *Briscoe* v. *Briscoe*, 1 J. & L. 334).

Presumption of election.

If the question arises between the heir and the personal representatives of the person entitled to elect, it seems that the Court will not presume an election against the will unless it be manifestly to the donee's advantage. In *Harris* v. *Watkins* (2 K. & J. 473), a testator devised his residuary real estate in lieu and discharge of all debts due to the devisee. The devisee died intestate three days after the testator. It was held that, as it was not manifestly for the disadvantage of the devisee to retain the devised estate, the Court could not presume a disclaimer, and that, consequently, the heir was entitled to the estate, and the

debts due to the devisee and claimed by the administrator were discharged; (and see *Croker* v. *Martin*, 1 Bl. N.S. 573; and Lord St. Leonards' comments thereon, Prop. H. L. 151).

11. It may here be added, that an heir under the old law was put to his election, where an estate was devised to him, although by the rule of law the devise was inoperative, and he took by descent (Sug. Pow. 577); but now, by 3 & 4 Will. 4, c. 106, s. 3, the heir takes as devisee. Election by heir.

But an English heir is not to be put to his election by an unattested will or codicil; nor by a will which is void by reason of the testator's incapacity, or which was not properly executed to pass real estate (*Gardiner* v. *Fell*, 1 J. & W. 22; *Ex parte Lord Ilchester*, 7 Ves. 372; *Hearle* v. *Greenbank*, 3 Atk. 715), unless the gift to him be by way of express condition (*Boughton* v. *Boughton*, 2 Ves. sen. 12).

But this doctrine did not apply to customary or copyhold heirs of lands not surrendered to the use of the will; nor to Scotch or colonial heirs (*Dewar* v. *Maitland*, 2 Eq. 834; *Brodie* v. *Barry*, 2 V. & B. 127; *Orrell* v. *Orrell*, 6 Ch. 302).

In the above-mentioned cases the English heir was not put to his election because there was a disability in the person of the testator (2 Ves. sen. 14); his will purporting to dispose of the property could not be read at all.

So, an appointment by will made during coverture by a married woman, in execution of a power to appoint "in case she should die in her husband's lifetime," will be absolutely void, if she survive him and die without republishing her will; and no case of election will be raised (*Blaiklock* v. *Grindle*, 7 Eq. 215), for the incapacity was hers; (and see *Rich* v. *Cockell*, 9 Ves. 369, 381).

But it does not seem to have been decided what would be the effect of a devise or appointment, if the donee were incapable of accepting from the testator that which the testator purports to give, by reason of some law or rule of public policy; *e.g.*, whether a man would be put to his election if his lands were devised by another person, before the Mortmain Act, 1891, to a charity, or to an alien before the Naturalization Act, 1870, and

a legacy was at the same time given to him. On the one hand, it might be contended that the Court would not aid an attempt at a violation of the law (8 Eq. 175; and cf. *Arnold* v. *Chapman*, 1 Ves. sen. 108; *Poor* v. *Mial*, 6 Mad. 32; *Henchman* v. *Att.-Gen.*, 3 M. & K. 485). On the other hand, it might be contended that, as regards a charity at any rate, it is not incapable of taking from the living legatee, and that as he can fulfil the testator's wish by a deed duly enrolled, he must do so, or compensate out of his legacy.

Qualified election.

12. There are cases in which special directions are given as to election, by which it may be confined to particular gifts, so as to prevent election as to other parts of the will.

In *East* v. *Cook* (2 Ves. sen. 30), a testator devised property belonging to his eldest son to his second son: and amongst other gifts to his eldest son, he gave him a piece of property which he stated to be in lieu of the property which he purported to take away from the eldest son. In such a case, the eldest son is merely put to his choice between those two bits of property. It is a case where the ordinary doctrine of election is excluded by an apparent expression of intention that only one of the gifts to the eldest son is conditional on his giving up what the testator purports to take away from him; (see the case explained, 6 Ch. 341).

Ademption and satisfaction.

13. The doctrine of ademption and satisfaction is connected with that of election, and should not be entirely omitted, although the cases with reference to powers are rare: but it is not proposed to consider here the general law on the subject, for which reference may be made to *Ex parte Pye* (2 W. & T. L. C.). The difference between ademption and satisfaction is, that in ademption a benefit given by a previous will is taken away by a subsequent gift or settlement. In satisfaction, a pre-existing portion or debt is satisfied by a subsequent gift, usually, but not necessarily, by will (see *Chichester* v. *Coventry*, L. R. 2 H. L. 71). The question is one of intention in each case (*ibid.*); and if there is an express declaration of intention, which is admissible, no question can arise. If there is no such express declaration, there is always a strong presumption in law in favour of the ademp-

Presumption of law in each case.

tion or satisfaction of portions by subsequent gifts made by a parent or a person *in loco parentis*; "upon an artificial notion and a sort of feeling upon what is called a leaning against double portions." There is also a presumption that a debt is meant to be satisfied by a legacy of larger or equal amount, on the maxim *Debitor non presumitur donare*, but the Courts regard this maxim with disfavour, and hold that a debt is not satisfied *pro tanto* by a legacy of less amount.

Three classes of cases.

14. The cases in which the question of satisfaction by advances made by parents usually arises may be divided into three, viz.: (i.) where the parent is under a personal liability (either under a covenant, or as having received money affected with a trust) to make a settlement for the benefit of his children, or has an estate of his own not settled, but charged with a sum, for the benefit of his children; (ii.) where a sum for the benefit of children is charged on an estate not the estate of the parent, but subject to a settlement; (iii.) where land or money is limited to the use of or held upon trust for children as the parent shall appoint (*Lee* v. *Head*, 1 K. & J. 630).

Two questions in each case: general rules applicable thereto.

15. In all these cases, the first question is, was the advance intended to be a satisfaction? and if that is answered in the affirmative, the further question arises, for whose benefit was the satisfaction intended to operate? In answering these questions, the following rules must be borne in mind.

> Satisfaction on the assumption of the discharge of a debt can only arise where the person who makes the advance is himself the person bound to pay, or is the owner of the estate charged with the payment.

In *Roberts* v. *Dixall* (Eq. Ca. Abr. 668, pl. 19) A. covenanted on his marriage that his estate should be charged with 1,000*l.* for younger children, and his wife's estate was at the same time settled, with a power for A. and his wife and the survivor of them to appoint it among their younger children. A. survived his wife, and by will gave his daughter (the only younger child)

3,000*l.* in full satisfaction of the 1,000*l.*, and he charged the 3,000*l.* on the estate brought into settlement by his wife. This was held good as an appointment under the power, but not to be a discharge of the covenant. Lord Hardwicke said, "Where a gift is to discharge a former debt, something should move from the giver, but here the whole is to arise out of his wife's estate, and, therefore, to satisfy the father's covenant, this declaration is entirely void." It was held that the daughter should have 3,000*l.* and no more, that 2,000*l.* thereof should be raised out of the estate subject to the power, and the remaining 1,000*l.* should be paid out of the father's estate in discharge of his covenant.

Samuel v. *Ward* (22 Beav. 347) is to the same effect. In that case, Lord Romilly says, "Suppose the case of an uncle settling certain sums on his nephews, it would be impossible to maintain that their father, by advancing the amounts without any understanding, would become entitled to stand in the place of his children under the settlement."

16. Satisfaction on the ground of the leaning against double portions can only arise where both portions issue from one and the same person (*Walpole* v. *Lord Conway*, Barnard. 156, 157; *Douglas* v. *Willes*, 7 Hare, 328).

In *Sir W. Davie's case* (5 Vin. Abr. 292, pl. 38), an estate in Somersetshire, of which Sir W. Davie's first wife was tenant in tail, was settled, the uses being declared to them and the issue of their body, remainder to Sir William and his heirs: they had a daughter, Mary, and the *feme* died. On the marriage there were articles that Sir William should leave his daughter 2,500*l.* Sir William married again and had several daughters. By deed executed in his lifetime he gave the Somersetshire estate to Mary and her heirs, and by deed he charged his reversionary interest in lands in Devon with 5,000*l.* apiece for his daughters. After his death Mary claimed the 2,500*l.*, and Lord Keeper Harcourt decreed it to her with

interest at 5*l.* per cent. from Sir William's death: for that the Somersetshire estate could not be an equivalent, because it moved from her mother, and was the condition of the agreement for the 2,500*l.*

Parent may purchase his children's portions.

It seems that there is no objection to the parent becoming the purchaser of his children's shares (Sug. Pow. 634; *Gower* v. *Gower*, 1 Cox, 53; *Samuel* v. *Ward*, 22 Beav. 347; *Noel* v. *Lord Walsingham*, 2 S. & S. 99). But this must be taken subject to the rules qualifying the powers of parents to bargain with their children; (see *Cuninghame* v. *Anstruther*, L. R. 2 S. & D. 223, *post*, p. 407; and 2 Ves. jun. 714).

Presumption of law in first class of cases.

17. It is impossible to lay down any general rules for the decision of cases which are mere questions of intention. But the presumption of law in each case may be stated as follows. In the first class of cases above mentioned, viz., where the parent is under a personal liability or has an estate of his own charged with a sum for the benefit of his children, and makes an advance to a child, the presumption is that the parent's debt is satisfied or his estate released by the advance.

In *Pitt* v. *Jackson* (2 Bro. C. C. 51; S. C. sub nom. *Smith* v. *Lord Camelford*, 2 Ves. jun. 698), a sum of 20,000*l.*, part of which was the wife's portion, and part a sum which the husband had agreed to advance on the marriage, was to be laid out in the purchase of lands to be settled (subject to successive life estates in the husband and wife) to the use of the children of the marriage, as the father should by deed or will appoint; and in default, to the use of the children in tail. There were two children, Mary, Mrs. Smith, and Ann, Lady Camelford. The father received the whole money, and was a debtor for it. He bought an estate in Norfolk. By his will in 1768 he gave his children 10,000*l.* and 30,000*l.*, the former sum being half the amount held in trust to be settled, the latter being a pure legacy. In 1771, Ann married Lord Camelford, and her father gave her a portion of 40,000*l.* Consols. A month after the marriage he made a codicil reciting his will, the marriage of Ann and the portion, and revoked the legacy of 40,000*l.* In his will he had stated that it was not his intention that the purchase of the

estate in Norfolk should be considered as an investment of the 20,000*l.*, and he treated himself as a debtor for that amount. In his codicil he said that having provided for his daughter he took away the legacy of 40,000*l.*, *i. e.*, the 10,000*l.* and the 30,000*l.* Lord Kenyon thought that, on the facts before him, the testator was at liberty to say that the purchase was not to be considered an investment of the trust fund, and counsel conceded that the father by advancing the 40,000*l.* Consols had satisfied Ann's share of the 20,000*l.* The case then came before Lord Loughborough on a bill of review, and on the further facts before him, he held that the father was not at liberty to say that the trust fund had not been laid out in the purchase of the estate; but he proceeded: "Upon the whole train of authorities on the head of satisfaction Mr. Wilkinson has satisfied all the interest that Lady Camelford could as a creditor set up in opposition to any act of his will with regard to her provision under the marriage settlement. . . . At his death his will as to Mrs. Smith was no appointment of the land. As to Lady Camelford it operated absolutely as a bar to any claim that could be set up by her, as entitled as a creditor to any equitable interest, for he, by satisfying all she is entitled to, stands in her place" (2 Ves. jun. 713, 714). See *per* Wood V.-C., 1 K. & J. 632—4, where he says that the case is an authority, so far as it was before Lord Kenyon, that the debt was satisfied by the payment made by the testator in his lifetime; and that Lord Loughborough seemed to treat it as a quasi-debt, although he relied also on the evidence of the testator's intention derived from the codicil.

The case of *Dawson* v. *Duke of Cleveland* (West. Rep. t. Hardwicke, 106) seems to have proceeded on the same grounds. In that case the Duke had 3,000*l.* and 1,000*l.* per annum granted to him and his heirs male out of the hereditary excise, and he had power to appoint the premises to trustees to raise portions for younger children. He appointed part of the said sums to trustees for a term of twenty-one years to raise 8,000*l.* for the marriage portion of his daughter Grace, provided she married with consent, and subject thereto for his other younger children.

On the subsequent marriage of Grace he gave her 20,000*l.*; and the question arose whether Grace took both the 8,000*l.* and the 20,000*l.*; or if not, whether the 8,000*l.* went to the other younger children, or to the heir, or to the personal representative of the duke. The Lord Chancellor decided in favour of the personal representative.

Are the real or personal representatives of the parent entitled to benefit of charge paid off by him.

It does not appear from the report on what ground the personal representative of the duke was held entitled to the 8,000*l.* in preference to the heir. Probably the entail was a parliamentary entail, reducing each tenant to the position of a tenant for life. If the parent is a mere debtor, his personal estate is released by the fulfilment of his obligation, and no question between his heir and personal representative arises; but where a man is tenant in fee or in tail of land subject to a charge, and he pays off that charge, such payment is *primâ facie* presumed to be made in favour of and in order to exonerate the estate (*Earl of Buckingham* v. *Hobart*, 3 Sw. 186, 199). If he is merely tenant for life or tenant in tail without power of barring the entail, the payment is *primâ facie* presumed to be made for his own benefit (*Jones* v. *Morgan*, 1 B. C. C. 206; *Shrewsbury* v. *Shrewsbury*, 1 Ves. jun. 227; *Lindsay* v. *Lord Wicklow*, 7 I. R. Eq. 192, 206; *Ex parte Digby*, Jac. 235).

Presumption of law in second class of cases.

In the second class of cases above mentioned, namely, where a sum for the benefit of children is charged on an estate not the estate of the parent, but subject to a settlement (as where portions are to be raised for children and subject thereto, the estate is limited in strict settlement), three questions may arise, namely: (i) whether the advance operates for the benefit of the estate; (ii) whether the parent has purchased the share of the child advanced; or (iii) whether the fund is discharged from the claim of the child advanced for the benefit of the other children entitled thereto. The presumption of law in cases of this class is that the advance operates for the benefit of the children interested in the portion fund, and not for the benefit of the person making the advance, or of the estate (*Ford* v. *Tynte*, 2 H. & M. 324).

Where there

If, however, the settlement contains an express provision that

is an advancement clause.

advances made by the parent in his lifetime are to be taken in satisfaction of the portions provided by the settlement, any advance made by the parent will be *primâ facie* presumed to be for the benefit of the estate. In *Noel* v. *Lord Walsingham* (2 S. & S. 99), the parent was tenant for life of certain real estates, with power to appoint the shares in which his younger children were to take a sum to be raised for their portions. One question in the suit was as to the share in the fund of a daughter, Lady Edward O'Bryen. Her father, by his will dated 1809, appointed the fund to his daughters (except Lady Walsingham, whom he had then provided for) equally. In 1815, on her marriage, Lady Edward O'Bryen, in consideration of 10,000*l.* secured to her by her father, released to him and his heirs all her right, title, and interest in the hereditaments comprised in the settlement, so that neither she nor those claiming under her should have any further interest in the property. By the terms of the original settlement, any advance made by the father in his lifetime was to be taken in or towards satisfaction of the portion provided by the settlement for a younger child, unless the parent should declare the contrary. Sir John Leach said:—"I apprehend that the true construction of this provision is, that if the father make an advance to an object of the settlement without any declaration of intention in respect to it, the advance operates to the exoneration of the estate charged with the portion, but that the father is at liberty to declare that the child advanced shall, notwithstanding, receive its full portion, or is at liberty to consider himself *pro tanto* the purchaser of the portion, and to declare in effect that it shall remain a charge upon the estate for his benefit."

Presumption of law in third class of cases.

In the third class of cases above mentioned, namely, where land or money is limited to the use of or held upon trust for children as the parent shall appoint, the presumption is that the parent, in making an advance to one child, intended to clear the property of the claim of that child, for the benefit of his other children, not of himself, and so as to let such other children have the benefit of the advanced child's share.

In *Lee* v. *Head* (1 K. & J. 620), lands were settled to the use

of the children of the marriage of A. and B. (subject to successive life estates to A. and B.) as A. should appoint, and in default, as B., if she survived A., should appoint. There were two children, a son and a daughter, and on the marriage of the latter, A. advanced her a sum exceeding in value her moiety of the lands; and by the settlement executed previously to her marriage it was declared that such sum was advanced and accepted in lieu and satisfaction of all sums of money and interests to which the daughter then was, or at any time thereafter should be, entitled under her parents' settlement. Vice-Chancellor Wood said there was a certain analogy between the case before him and cases of purchases for children. He examined the authorities on the orphanage customs of London, and held that the daughter's share was satisfied, and there being only two children, the case of *Boyle* v. *B. of Peterborough* (1 Ves. jun. 299) applied, and the son took the whole.

In *Folkes* v. *Western* (9 Ves. 456) the facts were very similar to those in *Lee* v. *Head*, a money fund being settled for the benefit of younger children as the parents or the survivor should appoint, and in default for the children equally, and a settlement was made on one child in satisfaction of all her claims on the fund. The child advanced was held to be removed out of the way for the benefit of the other child.

It will be observed that the effect of the advance in these two cases was to destroy the power of appointment by the mother, who survived the father.

In *Noblett* v. *Litchfield* (7 Ir. Ch. R. 575) 5,000*l.* was settled on the children of the marriage of A. and B., after successive life interests to A. and B., as A. should appoint, and in default on the children equally; the settlement contained a hotchpot, but no advancement, clause. There were five children of the marriage. On the marriage of one child, C., in 1844, A. settled 1,000*l.* on her. In 1845 he made his will, and thereby, after reciting that he had five children, and was desirous of appointing the 5,000*l.* amongst them all (except C., who was already otherwise provided for), he appointed 1,000*l.* each to D., E., and F., and 2,000*l.* to G. In 1848 he settled 1,000*l.*

and 1,200*l.* on D.'s marriage, and made a codicil revoking the appointment and bequests to her by his will in consequence of the said provision made for her on her marriage. The Lord Chancellor held that the father did not purchase the share of D., and that such share went as in default of appointment; and that C. and D. were entitled to share with E. and F. in it; (see, too, *Ld. Bradford* v. *Ld. Romney*, 31 L. J. Ch. 497).

In settlements the real estate, not the personal estate, is primarily liable.

The general rule that, where there is a personal covenant for payment and a charge, the personal assets are first charged, does not extend to settlements. In such cases there is no personal benefit accruing to the covenantor, but the whole arrangement is merely for the purpose of securing a jointure or portion, and the personalty not having received any benefit, the true intent is that the real and not the personal estate should be the primary fund (*Lanoy* v. *D. of Athol*, 2 Atk. 444; *Lechmere* v. *Charlton*, 15 Ves. 193; *Graves* v. *Hicks*, 6 Sim. 398; *Loosemore* v. *Knapman*, Kay, 123).

Construction of advancement clause.

It is not unusual to find in settlements a provision to the effect that if the parent advance any of his children in his lifetime, or by will, such advance shall be treated as a satisfaction of the portions provided for the children. The construction of these words has given rise to somewhat conflicting decisions. In *Cooper* v. *Cooper* (L. R. 8 Ch. 813), real estates were devised in strict settlement, and a term was devised to trustees on trust to raise portions for younger children; and it was provided that if either of the parents should at any time during their joint lives, or the life of the survivor, advance or pay any sum or sums of money for the benefit of any younger child, then, unless the contrary should be directed by deed, such advance should be taken as a satisfaction of the portion. A gift by will was held not to fall within this provision.

On the other hand, the contrary was held in *Twisden* v. *Twisden* (9 Ves. 413); *Leake* v. *Leake* (10 Ves. 477); *Onslow* v. *Michell* (18 Ves. 490), and *Goolding* v. *Haverfield* (M'Cl. 345; 13 Price, 593).

CHAPTER X.

FRAUDULENT APPOINTMENTS.

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1. A PERSON having a limited power, must exercise it *bonâ fide* for the end designed; otherwise the execution is corrupt and void (*Aleyn* v. *Belchier*, 1 W. & T. L. C.; 1 Eden, 132).

Duty of persons executing powers.

"A party having a power like this (*i. e.*, a limited power) must fairly and honestly execute it, without having any ulterior object to be accomplished. He cannot carry into execution any indirect object, or acquire any benefit for himself either directly or indirectly. It may be subject to directions or limitations; but it must be a pure straightforward honest dedication of the property, as property, to the person to whom he affects or attempts to give it in that character." "He must act with good

faith and sincerity, and with an entire and single view to the real purpose and object of the power, and not for the purpose of accomplishing or carrying into effect any bye or sinister object (sinister in the sense of being beyond the purpose and intent of the power)" (*Duke of Portland* v. *Topham*, 11 H. L. C. 32).

"Any attempt to exceed the limitations of the power through the medium of any appointment to one of the objects of it in exclusion of the others, is equally invalid, whether the purpose of the donee be selfish, or, as he supposes, a more beneficial mode of effecting that which he takes the donor of the power to have desired. The Court will not allow him to interpret the donor's intention in any other sense than the Court itself holds to be the true construction of the instrument creating the power; and a literal execution of the power, with a purpose which it does not sanction, is regarded as a fraud on the power (*ibid.*, 5 Ch. 40, 59, *per* L. C. Hatherley).

Appointment under joint power.

An appointment in exercise of a joint power may be fraudulent, although one of the appointors only is infected with a fraudulent intent; and the same principles apply to powers of advancement as to powers of appointment (*Lawrie* v. *Bankes*, 4 K. & J. 142).

Appointment in part fraudulent.

But where there is an appointment to A. and B. by one instrument (and *à fortiori* by different instruments), the appointment to A. may be good, and the appointment to B. bad, if the fraudulent purpose affects the latter only (*Harrison* v. *Randall*, 9 Ha. 397). But inasmuch as the Court will not undo part of an entire transaction, no suit can be entertained to set aside an appointment of part of the trust funds as a fraud on the power, when another appointment of other part of the same trust funds has been made and is not impeached, and the object is to equalise the interests of the several appointees (*ibid.*). And the persons prejudiced by the fraudulent appointment may by actual confirmation, or by acquiescence, confirm such appointment (*Skelton* v. *Flanagan*, 1 I. R. Eq. 362; *Preston* v. *Preston*, 21 L. T. 346; and cf. *Roach* v. *Trood*, 3 Ch. D. 429).

Confirmation or acquiescence.

Liability of appointor.

If the appointment is set aside, the appointor is liable to replace the whole fund withdrawn for his benefit under the

appointment, and not merely to pay the actual amount of profit made by himself. Thus, in *Bridger* v. *Deane* (42 Ch. D. 9), an appointment of a policy of assurance on the appointor's life was set aside as fraudulent; the policy had been surrendered and the appointor had received the surrender value and had since died: and his estate was held bound to replace the whole sum assured.

Purpose of execution.

2. What the Court acts upon is the fraud upon the power, in the exercise of it for purposes foreign to those for which it was created: the question in each case must be, what was the purpose for which the power was exercised.

Appointments may be fraudulent in that they were made (*a*) for a corrupt purpose; or (*b*) in consideration of an antecedent agreement with the appointee to effect objects not within the scope of the power; or (*c*) for purposes foreign to the power.

If made for corrupt purpose.

(*a.*) Powers are fraudulently executed if the execution was made for a corrupt purpose.

A simple example of this is where the appointor intends a benefit to result to himself. In *Lord Hinchinbroke* v. *Seymour* (1 Bro. C. C. 395), there was a power in a settlement to raise a portion for a younger child at such time as the parent should direct: he directed it to be raised when she was fourteen; she shortly afterwards died, and the bill of her father, as her administrator, to have the portion raised for his own benefit, was dismissed. This case rests on the fraudulent purpose which was found as a fact to exist; for, where the appointor has power to fix the time at which portions shall vest, there is no rule of law which prohibits the raising of a portion charged on land if the child dies under twenty-one and unmarried (*Henty* v. *Wrey*, 21 Ch. D. 332).

In *Keily* v. *Keily* (4 Dr. & War. 38), Lord St. Leonards says that the Court has authority to defeat such an act as that of a father charging a portion for his child, not because the child wants it, but because the child is in delicate health and likely to die, that is, because it is likely to come to some one not an object of the power.

In *Lord Sandwich's case* (mentioned 11 Ves. 479 and 4 Dr. & War. 55), a father, with a power of appointment among his children, supposing one of them to be in a consumption, executed his power in favour of that child: the Court declared the appointment void, being of opinion that the object of the appointor, when he made the appointment, was that he might himself have the chance of getting the share as the administrator of his child.

In *Rowley* v. *Rowley* (Kay, 242), a wife agreed with her husband to postpone her pin-money and jointure rent-charges to enable him to mortgage, in consideration of his appointing part of a fund over which he had a limited power to a younger child. V.-C. Wood said that he should have very little hesitation in saying that an appointment of that kind could not be supported if it became the interest of any parties to dispute it, although he did not find any precise case to that effect. There are numerous cases where the father has taken an advantage from the fund subject to the power of appointment. He thought it would be impossible to contend that, if a direct bribe were given to the appointor, though out of a separate fund, the appointment could be upheld in favour of the party to whom the fund subject to appointment was given.

In *Harrison* v. *Randall* (9 Ha. 397), policies of assurance on A.'s life were settled in trust for his daughters as he should appoint; and estates were limited to secure the payment of the premiums. The trustees advanced moneys to pay the premiums, and A. appointed the bonuses which had accrued to three of his daughters, and they subsequently authorized the trustees to receive them, partly in discharge of the premiums already paid by the trustees, and partly to form a fund to pay future premiums. This appointment was held a fraud on the power, its object being to release the father.

In *Wellesley* v. *Lord Mornington* (2 K. & J. 143), where a father appointed to a son, then in a state of mental and bodily disease, of which he died within a year, the appointment was set aside, the Court inferring from the evidence as to the father's knowledge of his son's state of health and pecuniary circum-

stances, as to the circumstances attending the preparation and execution of the appointment, and as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, and was a fraud upon the power; (and see *Warde* v. *Dixon*, 28 L. J. Ch. 315; *Gee* v. *Gurney*, 2 Coll. 486; *Davies* v. *Huguenin*, 1 H. & M. 730; *Carroll* v. *Graham*, 11 Jur. N. S. 1012).

Parent cannot bargain with children for purchase.

And a parent cannot bargain with his children, on executing a power of appointment in their favour, for the purchase of other expectant shares belonging to them.

In *Cuninghame* v. *Anstruther* (L. R. 2 Sc. & D. 223), a marriage settlement contained a power of appointing among children, with a gift to them in default. The donees appointed parts of the fund to their three daughters. On the occasion of each appointment, the appointee declared that the appointment was in full satisfaction (*inter alia*) "of the share or division thereby allotted to her of her said father and mother's property settled by the marriage contract." The surviving donee of the power then proceeded to deal with the residue of the fund in a way not authorized by the power. It was held that his attempt to deal or negotiate with his children was invalid, and that the residue unappointed must go as in default of appointment, notwithstanding the releases executed by the appointees. It was not, however, suggested that the appointments were invalid, although they might be said to have been made partly in consideration of the releases by the appointees.

Purchase by father apart from bargain not illegal.

But there is nothing in the relationship of father and child which renders a purchase of the latter's interest by the former illegal, although the existence of the child's interest depends on an appointment, or absence of appointment, by the father. In *Barron* v. *Barron* (2 Jones, 798), the father had power to appoint land amongst his issue male; the father conveyed other lands of his own to a trustee for his eldest son and his issue in consideration of the son releasing all his right under the settlement; and the father was held entitled to the son's share in default of appointment; (and see *Askham* v. *Barker*, 17 B. 37; *Folkes* v.

Western, 9 Ves. 456; *Noel* v. *Lord Walsingham*, 2 S. & S. 99; *Brownlow* v. *Lord Meath*, 2 Dr. & Wal. 674).

Cannot buy more than share of child in default.

But a father who purchases the share of a child cannot by appointment entitle himself to more than the share in default of appointment of that child (*Smith* v. *Lord Camelford*, 2 Ves. 714). And it has been said that if a father, in making an appointment, gives to the child other property, and sells to him part of his own interest, the Court will not weigh the consideration (*Langston* v. *Blackmore*, Amb. 289; but see *Conolly* v. *MacDermott*, Beat. 601, reversed in Dom. Proc.; Sug. Prop. H. of L. 513).

Consent by trustees.

Trustees must exercise any discretionary power they may have (*e.g.*, to consent) *bonâ fide* for the benefit of the persons for whom they are trustees. In *Eland* v. *Baker* (29 B. 137), a marriage settlement contained a power for the husband and wife, with the consent of the trustees, to make void the trusts of the settlement, and to limit the estate to new uses. This power was exercised for the purpose of mortgaging the estate to one of the trustees to secure a sum advanced to the husband. The estate was afterwards sold under a power of sale in the mortgage deed. It was held that a good title could not be made.

Appointment by will in pursuance of a covenant to appoint.

If the donee of a limited power, exercisable by will only, covenants to execute the power in favour of an object, and by will in execution of the covenant exercises it accordingly, such appointment is not a fraud on the power; although if the sum covenanted to be appointed were not so appointed to, or left unappointed to devolve upon, the covenantee, he could recover damages from the covenantor's estate (*Coffin* v. *Cooper*, 2 Dr. & S. 365; *Palmer* v. *Locke*, 15 Ch. D. 294). In the latter case, Brett, L. J., said that such a bond or covenant by the donee of a limited testamentary power was in his opinion entirely void.

In *Thacker* v. *Key* (8 Eq. 408), A. had a testamentary power of appointment among his children, and on the marriage of one of his daughters, he covenanted that he would exercise it by appointing one-fifth to her. It was unnecessary to determine the point, but V.-C. James thought that he should have had little difficulty in holding such a covenant to be illegal and void. The power was a fiduciary one to be executed by will only, so that

up to the last moment of the donee's life he was to have the power of dealing with the fund as he should think it his duty to deal with it, having regard to the then wants, position, merits, and necessities of his children. The Vice-Chancellor did not see how it could be considered right or proper that the appointor should fetter his fiduciary discretion by a covenant executed by him in his lifetime.

But in *Bulteel* v. *Plummer* (6 Ch. 160), where a testatrix with a similar power covenanted to appoint 2,500*l.* to a child, and by her will appointed accordingly; Lord Hatherley thought that it would be a very forced application of the doctrine as to appointments if it were held bad, although there was something like an improper exercise of the power, and of course the appointor tried to exonerate her own estate. The testatrix did not wish to get any benefit for herself, and he thought she was not prevented from appointing the 2,500*l.* L. J. James does not touch on the question in his judgment, and it appears not to have been pressed in argument. But it is to be observed that if the appointment had been held bad, the decision of the Court on the main question in the suit would have been different; (and see *Davies* v. *Huguenin*, 1 H. & M. 730). An appointment made under a general testamentary power, coupled with a covenant not to revoke the will, is not a fraudulent exercise of the power (*Robinson* v. *Ommanney*, 21 Ch. D. 780). As to the damages recoverable under such a covenant, see *Re Parkin*, (1892) 3 Ch. 510.

Appointments not necessarily bad because appointor may derive some benefit.

3. But although the rule is clear that the donee of a power cannot stipulate for any benefit for himself with reference to the exercise of the power, and that if he does so the whole appointment is vitiated by the consideration that he has not made it with the simple intention of providing for the objects of the power, appointments are not necessarily fraudulent because the appointor may possibly derive some benefit from them. In *Re Huish's Charity* (10 Eq. 5), the Master of the Rolls said: "The meaning and the good sense of the rule appears to be, that if the appointor, either directly or indirectly, obtain any exclusive advantage to himself, and that to obtain this advantage is the object and the reason of its being made, then that the appoint-

ment is bad; but that if the whole transaction taken together shows no such object, but only shows an intention to improve the whole subject-matter of the appointment for the benefit of all the objects of the power, then the exercise of the power is not fraudulent or void, although by the force of circumstances such improvement cannot be bestowed on the property, which is the subject of the appointment, without the appointor to some extent participating therein." In that case the tenant for life of real estate under a marriage settlement had a power of appointing the estate among the children of the marriage, of whom there were four. The settlement contained no power of granting building leases. An appointment was made to one of the children of the marriage; and subsequently the appointor and appointee joined in conveying the estate to trustees on trust to grant building leases, and subject thereto on trust, as to one-fourth, for the appointee, and as to the other three-fourths, on trusts corresponding to those contained in the original settlement. It was held that a good title could be made by the appointees.

Appointment to enable the grant of building leases.

In *Pickles* v. *Pickles* (31 L. J. Ch. 146), a tenant for life, with power of appointment by deed or will among his children, had no power of leasing. He granted a lease, and on the day of its execution made a will exercising the power in favour of one of his children; and he and this child at the same time gave the lessee a bond of indemnity against the defeazance of the lease by the death of the appointor during the term. This appointment was held good.

In *Cockcroft* v. *Sutcliffe* (25 L. J. Ch. 313), lands were limited to a father for life, with an exclusive power of appointment among children. Two of his sons set up in business as millers in partnership, and at their request the father joined the firm. In order to provide capital for the business, the father appointed the lands to the two sons exclusively, and joined with them in mortgaging the fee for 800*l.*, which was placed to the general credit of the firm, other property of the father to the extent of 600*l.* being included in the security. There being no evidence of any bargain or *mala fides* on the father's part, and no advantage to him except such as he derived from the mortgage money

being employed by the firm of which he was a partner, the appointment was held valid; (see too, *Pares* v. *Pares*, 33 L. J. Ch. 215; *Baldwin* v. *Roche*, 5 Ir. Eq. R. 110).

Power of revocation may be exercised, though benefiting person revoking.

And it is not necessarily fraudulent for a father, who has executed an appointment reserving to himself a power of revocation, to exercise such power of revocation, although the effect will be to entitle him to a share in the fund in default of appointment. In *Shirley* v. *Fisher* (47 L. T. 109), trust funds were settled on the children of a marriage, subject to a power of appointment among them by their father. There were four children, one of whom died in 1869, a bachelor and intestate, and his father became his legal personal representative. In 1876 the father appointed the trust fund to the other three equally, reserving to himself a power of revocation. In 1880 he revoked this appointment, and proposed to execute a release of his power, and claimed his deceased son's share as his legal personal representative. It was held that there was no evidence of fraud in these circumstances, and that the father was entitled to the share.

Ultimate limitation in favour of appointor.

In *Cooper* v. *Cooper* (5 Ch. 203), under the ordinary power of appointment among children, a share was appointed to an infant daughter on her marriage, and it was recited that the appointment was made in order that her share might be settled: it was so settled, but after the usual limitations to the husband and wife, and then to the children, the ultimate trust in default of children was in favour of the appointor, the father. In the same settlement, the father entered into a bond for payment of a certain sum with interest. This was held not to be such a bargain as could be supposed to have influenced the appointor's mind in making the appointment, and without which it would not have been made. The appointee was an infant, and could enter into no binding contract concerning her share, and there was no bargain to take anything out of such share, but the husband promised to settle the fund so as to deprive himself of property to which he would otherwise have been entitled in his marital right. But Lord Hatherley thought that if a bargain with the appointee to insert such a limitation in default of issue were proved, there would be considerable difficulty in dealing

with such a settlement, although the appointor might make a provision equal to or greater in value than the ultimate reversion which he took; because it was obvious that, in the event of the husband and wife dying early without issue, the father might take an interest far greater than anything he had provided.

In *Wicherley's case* (Ambl. 234 n.), a remainderman filed a bill for relief against a jointure made by the tenant for life on his death-bed, in consideration of and previous to marriage, by virtue of a power. The appointment was sustained, although the tenant for life had asked the remainderman to join in charging the estate with his debts, and on his refusing had said, "I will marry and execute my power," and although he died eleven days after his marriage; (and see *Baldwin* v. *Roche*, 5 Ir. Eq. R. 110).

Infancy of appointee.

Nor will an appointment be avoided merely because the appointee is an infant, and the appointor may possibly derive some benefit from the appointment: if the power be well executed in other respects, the fact that it will disappoint some persons does not appear to be such an ill purpose as to make the appointment a fraud on the power and void.

In *Beere* v. *Hoffmister* (23 B. 101), A. and his wife had a power of appointing a fund to her children, which, in default, was settled on the children who attained 21, and, in default thereof, on the next-of-kin of the wife. There were powers of maintenance and advancement. There being but one child three and three-quarters years old, in robust health, and the wife being seriously ill, A. and his wife appointed the whole fund to the child, reserving a joint power of revocation. The child died two years after, and her father became entitled to her property. The appointment was nevertheless held valid, no bad purpose being shown; (and see *Butcher* v. *Jackson*, 14 Sim. 444; *Hamilton* v. *Kirwan*, 2 J. & L. 393; *Domville* v. *Lamb*, 1 W. R. 246; 9 Ha. App. lv.).

In *Fearon* v. *Desbrisay* (14 B. 635), a father had a power of appointment among his children, their shares to vest at such ages as he should appoint, and in default of appointment to vest in them at twenty-one; and there was a gift over if there

should be no child entitled under the trusts or under an exercise of the power. The father executed the power in favour of his first son at his birth, reserving a power of revocation; but afterwards, on an expected addition to his family, and being in a weak state of health, he revoked the former appointment and executed the power in favour of all his children who should be living at his death equally. It was manifest that the appointor could gain no personal advantage: for the persons in whose favour the appointment was to take effect could not be ascertained until his own death, and the intention of settlors is not to be ascertained merely from the manner in which the fund is given over in default of appointment. Accordingly one of the children having died, the appointed fund was successfully claimed by his mother, as his administratrix.

Onus probandi.

4. The burden of proving the corrupt purpose is on the party who attempts to upset the transaction: and mere suspicion is not enough: the wrong intention must be established (*Campbell* v. *Home*, 1 Y. & C. C. C. 664; *McQueen* v. *Farquhar*, 11 Ves. 467).

In *Pares* v. *Pares* (33 L. J. Ch. 215), P. had a power of appointment among her children by deed or will, and in February, 1853, made a will exercising the power in favour of two of her daughters. In March, 1853, she made a similar appointment by deed; and immediately afterwards she and her daughters joined in mortgaging the property, and the money was paid to P. The solicitors of the mortgagee acted for P. in the preparation of the will and of the deeds. The will was held a good appointment, although the deeds were clearly bad; no fraud being proved, and the facts, although suspicious, being consistent with honesty.

But motives, such as circumstances of anger and resentment, under which it is alleged that appointments are made, are not to be adverted to. "There would be no end to such objections, if they were to be admitted as grounds for questioning appointments: in almost all cases, where there has been an inequality in the appointment, something of that kind has existed" (*per* Lord Redesdale in *Vane* v. *Lord Dungannon*, 2 S. & L. 130; and see *post*, s. 10).

But the *onus probandi* may be shifted by the circumstances which have occurred. Thus the creation of a charge in favour of the appointor immediately after the appointment, may raise a case for an inquiry before the appointment can be acted on (*Jackson* v. *Jackson*, 7 Cl. & F. 977).

In *Humphrey* v. *Olver* (28 L. J. Ch. 406), it was held by the Court of Appeal that where there is proof that an appointor at one time intended a benefit to herself, the onus of proof that, at the time of the appointment, she had abandoned that intention, lies upon those who support the appointment. And where an appointment has been set aside by reason of what has taken place between the donee of a power and an appointee, a second appointment by the same donee cannot be upheld otherwise than by clear proof on the part of the appointee that the second appointment is perfectly free from the original taint which attached to the first (*Topham* v. *Duke of Portland*, 5 Ch. 40, 62).

Costs of trustees.

Although the Court will not relieve against a contract by a child with a parent for an appointment to the child, when the child is *particeps criminis* (*Palmer* v. *Wheeler*, 2 B. & B. 29), yet the Court watches with jealousy transactions between parent and child occurring shortly after the child has attained twenty-one, more especially where the transactions have had their inception during the minority of the child; and the Court will support trustees in exercising the same jealousy which the Court itself is in the habit of exercising. It must be ascertained, of course, that the trustees have acted *bonâ fide*, and have been influenced by no corrupt or improper motives: but if it appears that they have so acted, it is the duty of the Court to support and not to punish them (*King* v. *King*, 1 D. & J. 663; *Re Metcalfe*, 2 De G. J. & S. 122; *Firmin* v. *Pulham*, 2 De G. & Sm. 99: *Re Swan*, 2 H. & M. 34; *Whitmarsh* v. *Robertson*, 1 Y. & C. C. C. 715).

Liability of trustees.

And although trustees ought not to be astute in suspecting fraud, and may be made to pay costs if they raise untenable objections to acting upon appointments (*Campbell* v. *Home*, 1 Y. & C. C. C. 664; *Patterson* v. *Wooler*, 34 L. T. 415), yet if they part with the fund improperly, they will have to replace it.

"A trustee who, having good reason to doubt the validity of an appointment, thinks proper to act upon it, must be affected by the consequences which follow upon the act" (*Harrison* v. *Randall*, 9 Ha. 397). In *Mackechnie* v. *Marjoribanks* (18 W. R. 993; 39 L. J. Ch. 604), the donee of a limited power appointed the whole trust fund to her daughter, one of the objects of the power, who was about to be married. The money was paid by the trustee at the daughter's written request of even date with the appointment to the mother's banking account, and part of it was expended by the mother for her own purposes. She died insolvent. The trustee was held liable at the suit of the persons entitled in default of appointment to replace the fund. V.-C. James thought that the letter and the appointment really formed one transaction: it was as if the deed of appointment had contained a recital that it had been agreed that the money should be paid to the mother's account to be at her disposal. But the injured *cestui que trust* must not sleep upon his rights. "No doubt in case of an express trust lapse of time does not create a positive bar: but a court of equity will take it into consideration along with other circumstances in deciding whether the suit ought to be dismissed" (*Philips* v. *Pennefather*, 8 I. R. Eq. 474; *Roberts* v. *Tunstall*, 4 Ha. 257). See, now, Trustee Act, 1888, s. 8.

5. (*b.*) The execution may be fraudulent and void, on the ground that it was made in pursuance of an antecedent agreement by the appointee, to benefit persons not objects of the power, and that, whether the agreement be in itself unobjectionable or not. In consideration of antecedent agreement.

The appointor cannot stipulate for any advantage to himself. An agreement by an object of the power to return part in consideration of an appointment in his favour is a fraud on the part of the appointee and of the appointor (*Daubeny* v. *Cockburn*, 1 Mer. 644). Where a power is vested in a father, and a stipulation is made by him for his own benefit in the exercise of it, such an appointment, although in terms an appointment to For appointor's benefit.

the child, is in effect an appointment for the benefit of the father, and is fraudulent and void. And it is not necessary that it should be wholly for the benefit of the father: it is enough if it is partially so (*Jackson* v. *Jackson*, 7 Cl. & F. 977). In *Duggan* v *Duggan* (5 L. R. Ir. 525; 7 *ib.* 152), the appointment was made on condition that the appointee should buy the appointor's life interest in the appointed property; (and see *Stuart* v. *Lord Castlestuart*, 8 Ir. Ch. R. 408, and Sug. Pow. 527).

In *Farmer* v. *Martin* (2 Sim. 502), the appointment was made in consideration of an agreement to pay the appointor's debts, and to provide for his illegitimate son.

In *Askham* v. *Barker* (12 B. 499), the appointor had obtained part of the trust funds subject to the power, from the trustee, in breach of trust: he appointed to some of the objects of the power on an agreement that they should not make any claim against the trustee, or call on him (the appointor) to pay the amount.

In *Reid* v. *Reid* (25 B. 469), the appointment was made in discharge of an antecedent debt. In *Arnold* v. *Hardwick* (7 Sim. 343), in consideration of an agreement to lend the appointed fund to the appointor on good security: these were all held bad.

For benefit of strangers.

The appointor cannot stipulate for any benefit to any person not an object of the power.

In *Lee* v. *Fernie* (1 B. 483), A. desired to settle property on all the female descendants of D. then in existence; and by deed, reciting this desire, and that certain persons named were the only descendants of D. then in existence, settled the property upon these persons, reserving to himself a power to appoint part thereof among them as he pleased. He afterwards discovered that there were other descendants of D. in existence, and appointed part of the fund under his power to one of the objects on his executing a bond for the payment thereof to the newly found descendants of D. This was held void.

In *Carver* v. *Richards* (1 D. F. & J. 548), A. was entitled for life to certain estates, with a power of appointing them among her children. She appointed to her eldest son, on a bargain

between herself, her husband, and the son, that the estates should be settled, subject to the wife's life estate, to the use that the husband should receive a rentcharge for life, and subject thereto to the use of the children as the husband and wife should jointly appoint, or as the wife, if she survived, should appoint: this was held bad.

In *Salmon* v. *Gibbs* (3 De G. & Sm. 343), the donee of a power of appointment among children appointed almost the whole fund to one of her two daughters, on an understanding, but without positive agreement, that the appointee would resettle one moiety of it on trusts for the separate use of the other daughter (who was married) for life, exclusively of her husband, and after her death for her children. A resettlement was accordingly made without the privity of the married daughter, who did not hear of it until several years after. On the husband's suit, the appointment was declared invalid.

Re Kirwan (25 Ch. D. 373) is to the same effect.

6. An appointment to a child, an object of the power, and a contemporaneous settlement by him of the appointed fund, is valid, unless it can be shown that the appointment was made in pursuance of a contract inducing the appointment (*Goldsmid* v. *Goldsmid*, 2 Ha. 187; *Birley* v. *Birley*, 25 B. 299; 27 L. J. Ch. 569; and see Sug. Pow. 672, 673). Appointment and contemporaneous settlement good.

"If I have a right to appoint an estate to one of my children, and that child joins with me in a settlement of the estate upon his children, although the grandchildren, who may be thus provided for, were not objects of the power, yet, the child joining with me in that instrument, the Court would consider this as an appointment of the estate to the child, and then a disposition of it by him in favour of the grandchildren, although not objects of the power" (*per* Lord St. Leonards in *Thompson* v. *Simpson*, 1 Dr. & War. at p. 487).

Appointor's knowledge of appointee's intention to settle.

And the donee of a limited power of appointment may well execute it in favour of an object of the power, though he believes and knows that the appointee will at once dispose of the property in favour of persons who are not objects of the power. But if, besides this belief and knowledge, there is a bargain between the appointor and appointee that the appointee shall make a disposition in favour of persons not objects of the power, and the just result of the evidence is that the appointment would not have been made but for the bargain, then the appointment is void (*Pryor* v. *Pryor*, 2 D. J. & S. 205).

When the exercise of a power in favour of a child and the settlement of that child's share (she being about to be married) are made at the same period by contemporaneous instruments, though in form perhaps the instruments may not appear to be correctly framed, yet the Court regards it as an agreement on the part of that child that her share should be so settled, and the transaction is treated as an appointment made to her of her share, followed by the settlement of the share through the medium of the interest that she so acquires by virtue of the appointment (*Daniel* v. *Arkwright*, 2 H. & M. 95). In that case the power was to appoint among children: an appointment by deed poll was made to the trustees of a marriage settlement of even date of one of the children on the occasion of her marriage. This was held good: but an appointment by deed in favour of another daughter already married, her husband, and children, was held bad, for the daughter could not deal with her share by exercising any will of her own with reference to a settlement (*ibid.*).

There must be no antecedent contract.

There must be no antecedent contract inducing the appointment between the parties; a bargain between the donee and the object of the power to make a provision for persons not objects of the power without any benefit to himself would vitiate the appointment, if it were shown that such bargain induced the appointment. The question is, In what character does the appointee take the property? If for his absolute benefit, the appointment is good; but if for the purpose of distribution amongst persons not objects of the power, the appoint-

ment cannot be supported (*Birley* v. *Birley*, 25 B. 299; 27 L. J. Ch. 569). The case of *Tucker* v. *Tucker* (13 Price, 607), if at variance with this, cannot be supported. In that case, the appointor appointed to an object of the power in fee, but by a subsequent deed, and *pursuant to an agreement made prior to the execution of the power*, a term of years was created to provide for certain costs and to raise annuities, and subject thereto the estate was settled to the use of the appointee for life, with remainder to his children, strangers to the power. This appointment was held good. But in *Cutten* v. *Sanger* (2 You. & J. 459), the same settlement was held by the same judge to be merely voluntary, so far as it gave interests to the appointee's children as against the appointee's creditors: this showed that the antecedent agreement was not binding on the appointee; (and see Sug. Pow. 671—673).

Contract for settlement, when bad.

The mere existence of a contract between appointor and appointee for a settlement is not enough to avoid the appointment. In order to do this, it must be shown that the contract induced the appointment, and that, but for the contract, the appointment would not have been made. In *Re Turner* (28 Ch. D. 205), an estate was settled (in effect), as to one half, on A. for life, with remainder to his children, and as to the other half, on B. for life, with remainder to his children; and the trustees had power to appoint the fee of the shares of A. and B. to them or either of them. In 1882, A. and B. were both over sixty years of age, and had mortgaged their life estates, and neither of them had a child. A. and B. requested the trustees to convey to them in fee, and the trustees agreed to do so on an arrangement by which money was to be raised by mortgage of the fee to pay off the existing mortgages; and part of the fee was to be settled for the benefit of A. and B. and their respective wives and issue. The deed by which the trustees conveyed the fee recited that they had exercised their power on condition that the settlement should be made. This appointment was held good.

It is by no means unusual to find in marriage settlements a recital of an appointment, and of an agreement to settle the

appointed fund. It is, of course, desirable to avoid all question by making it clear that the appointment was made independently of, and prior to, the agreement to settle; but the case of *Re Turner* shows that the mere existence of an agreement would not avoid the settlement. The appointment by a father is not avoided because he knows, or even has agreed with his child, that she will settle the appointed fund. But if it were shown that the child desired not to settle, and that the father refused to appoint unless he or she agreed to do so, the appointment would be void.

Interests may be given to grandchildren (not objects) by way of settlement.

It has also been held that, under a power to appoint among children, interests may be given to grandchildren by way of settlement with the concurrence of their mother, an object of the power, and her husband (*White* v. *St. Barbe*, 1 V. & B. 399; *Wright* v. *Goff*, 22 B. 207).

In *Re Gosset* (19 B. 529), the Master of the Rolls says the cases establish this proposition, that what may be done by two deeds shall not fail because it is done by one, where it appears to have been done with the assent of all parties, who, perfectly knowing what their rights were, endeavoured to carry them into effect; (and see *Cuninghame* v. *Anstruther*, 2 Sc. & D. 223, at p. 234).

Reversionary property.

The rule is the same whether the subject-matter of the power be property in possession or reversion (*Re Gosset*, 19 B. 529); and as a husband could, before the Married Women's Property Act, 1882, dispose of his wife's reversionary interest in personalty against every one except his wife if she should survive him, it was immaterial that the wife, the object of the power, was a minor (*Fitzroy* v. *Duke of Richmond*, 27 B. 190).

Effect of M. W. P. Act.

Prior to the Married Women's Property Act, 1882, the husband became on marriage entitled to his wife's personal estate, and a settlement thereof by him was therefore effectual, although the wife was a minor. The settlement was in fact his settlement; but this is no longer possible since that Act; and the case of an infant wife can only be met by a settlement under the powers of 18 & 19 Vict. c. 43. It is to be observed that a settlement may be made under this Act, not merely on

the occasion of the marriage, but after the marriage has taken place (*Re Sampson and Wall*, 25 Ch. D. 482; and see *Seaton* v. *Seaton*, 13 App. Cas. 61, 68; *Re Leigh*, 40 Ch. D. 290).

Family arrangement may be valid.

It has also been held that, in an arrangement settling the interests of all the branches of a family, children may contract with each other to give to a parent, who has power to distribute property among them, some advantage which the parent, without their contract with each other, could not have.

In *Davis* v. *Uphill* (1 Sw. 129), an estate being limited under a marriage settlement to A. for life, with remainder to her children as she should appoint, with remainder to all the children equally, an agreement by the children that on her joining in suffering a recovery, the first use to which the recovery should enure should be to A. for life *without impeachment of waste*, was held valid.

And in *Wright* v. *Goff* (22 B. 207), A., a married woman, was the sole object of a power of which B. (the tenant for life of the fund) was the donee, and an arrangement was made between A. and her husband and B., in pursuance of which an appointment of the whole fund was made to A. at once, and she and her husband then resettled the fund, giving interests to A.'s husband and children. The husband survived his wife. It was considered that this was a family arrangement for a resettlement, and that the husband and his representatives were bound by it. (And cf. *Beddoes* v. *Pugh*, 26 B. 407, a case which shows that the Court must act on the provisions of a deed until it has been declared to be invalid; *Skelton* v. *Flanagan*, 1 I. R. Eq. 362; *Roach* v. *Trood*, 3 Ch. D. 429.)

7. (*c*.) The execution is fraudulent and void if made for purposes foreign to the power, although such purposes are not communicated to the appointee previously to the appointment, and although the appointor derive no personal benefit.

The intention of the settlor is to be strictly followed.

"The purpose of the author of a settlement, by which a power is created, is to benefit the objects within the range of

the power. If the power be exercised beyond that range, his intention is that the property, the subject of the power, shall go to those who are entitled in default of appointment. When therefore it is asked that effect may be given to an appointment, which has for its object to go beyond the power, it is in truth asked that the unauthorized purpose of the donee may be preferred to the authorized purpose of the donor, and that to the prejudice of those who would be entitled but for the donee's unauthorized purpose" (*per* L. J. Turner, 1 D. J. & S. 568). In *Weir* v. *Chamley* (1 Ir. Ch. R. 295), a sale of property having been made in a suit, the purchaser objected to the title, and his objection was allowed. The vendors appealed, and pending the appeal appointed to some of the objects so as to avoid the difficulty. This was held bad, one reason being that the appointment was made not for the benefit of the appointees, but on an emergency and for collateral purposes. (See, too, *Brewer* v. *Swirles*, 2 Sm. & G. 219, which may, perhaps, be supported on this ground.)

In *Topham* v. *Duke of Portland* (1 D. J. & S. 517; 11 H. L. C. 32), the duke, having a power of appointing portions among his younger children, appointed a double share to a younger child without previous communication with him. It appeared that the purpose of the appointment was, that one half of the double share should be held in trust, and the income accumulated during the life of the appointee and twenty-one years afterwards, or until the successor to the dukedom should direct such half and the accumulations to be paid to another child, who had been excluded on account of an intended marriage disliked by the appointor. In the absence of such directions, the said half and the accumulations were to be paid to the appointee. The appointee, soon after the appointment, executed a deed settling the moiety accordingly. It was held that the purpose of the appointment of the said half, although not communicated to the appointee, vitiated it as to that portion.

In *Re Marsden* (4 Drew. 594), the objects of the power were the children of the marriage: the donee (the wife) desired to benefit her husband: to effectuate this, she appointed to her

eldest daughter unconditionally on the face of it, but under an arrangement between the appointor and her husband that, on the appointor's death, the daughter should be informed by her father of the intention with which the appointment was made, and so be induced to carry out that intention. V.-C. Kindersley (p. 601) says:—"It is not necessary that the appointee should be privy to the transaction, because the design to defeat the purpose for which the power was created will stand just the same, whether the appointee was aware of it or not: and the case of *Wellesley* v. *Mornington* shows that it is not necessary, in order to bring the case within the scope of the jurisdiction on which this Court acts, that the appointee should be aware of the intentions of the appointment, or of its being actually made"; (and see *Re Crawshay*, 43 Ch. D. 615).

Appointment in consideration of residing abroad.

In *D'Abbadie* v. *Bizoin* (5 I. R. Eq. 205), A. had power to appoint certain lands among her children in such shares and proportions as she pleased: she devised part thereof to a trustee, on trust to sell and lay out the proceeds in the purchase of freehold property in France, and to convey the property so purchased to the testatrix's second son in fee, provided he should previously decide to reside in France; but if he decided not to reside in France, then she devised the property so purchased to another of her sons. The Court said that, on the face of the will, it was apparent that the devise to the second son was one which resulted from an intention on the part of the donee of the power to induce her son to reside in France, by giving him property which had belonged to another person, and over which the testatrix had only a power of appointment. The testatrix held out an inducement to her son to reside in France: that was an indirect object, not warranted by the power, and so inseparably connected with the devise or appointment that it made it fail entirely.

On the other hand, it was held, in *Hodgson* v. *Halford* (11 Ch. D. 959), that a forfeiture clause on marrying anyone not a Jew, annexed to an appointment under a limited power, was authorized by the power. The principle upon which Hall, V.-C., rests his judgment, that a power of appointment among children

ought to be construed, "so as to embrace every ordinary provision which a parent might make, and which might be useful or available" for his children, seems too widely expressed, and if adopted would dispose of many cases of frauds on powers.

The settlor's intention is to be collected from his deed only.

8. The intention of the donor of a power must be ascertained from the instrument creating it, and can only be dealt with as it is therein expressed.

It makes no difference that the settlor is himself the donee of the power: if he declare trusts, reserving a power to be exercised for the benefit of a limited class only, he cannot alter that destination of the property (*Lee* v. *Fernie*, 1 B. 483).

In *Topham* v. *Duke of Portland* (1 D. J. & S. 517), the second question was this:—The late duke declared that trustees should hold certain funds after his death on trust for his daughters, H. and M., or one of them, as his son (the present duke) should appoint, and in default of appointment should pay the dividends to H. and M. in equal shares during their joint lives, with remainders over. At the time the settlement was made the settlor objected to a proposed marriage of M., and made the settlement in order that, in the event of the marriage, the income should be appointed, as to one half, for H., and as to the other half, to be dealt with according to circumstances. After the death of the settlor, M. married: the present duke thereupon appointed the income of the whole fund to H. for life, reserving a power of revocation. H. was not informed of the appointment, and it was shown that the intention of the present duke and of H. was to accumulate one moiety of the income and to hold it in suspense. The Lords Justices were of opinion that the deed creating the power did not authorize an entire suspension of the enjoyment of the fund for the purpose of accumulation during an indefinite period; and that an appointment of the whole had been made to H. without any intention of giving her any benefit in one moiety, and for the express purpose of its being accumulated, the accumulations to be disposed of as eventually

the present duke should direct, and that she had assented to such arrangement. And, moreover, that the control of M.'s share could not be delegated to H.

The House of Lords (11 H. L. C. 32) affirmed the decision of the Lords Justices, on the simple ground that H. had in reality no knowledge of the deed of appointment, and that it was evident, from the slender information communicated to her, and from the reservation of the power of revocation, that she was not intended to have any real ownership or control over the fund.

This execution of the power having been declared void, the present duke executed a second deed of appointment, appointing the income to H. during the joint lives of herself and M. absolutely. H. was duly informed that this appointment had been made, and she and the duke deposed that there was no agreement between them as to the disposition of the income. In *Topham* v. *Duke of Portland* (5 Ch. 40), this was also held invalid. The Lord Chancellor (Hatherley) thought that a valid appointment might have been made to H.: but the real point for consideration was, whether or not, though now conscious of her strict right at law to dispose of the fund, the pressure of a moral obligation not to appropriate more than one half of it to her own use, and to hold the other half subject to the duke's intentions and for his purposes, did not, at the date of the last appointment, and still, weigh on her mind with such force as to convert her into a mere passive instrument of the duke's intentions, and whether such her sense of moral obligation was not well known to the duke: and if so, whether he had taken any step whatever to discharge her from it, and restore to her complete freedom of action. *Hutchins* v. *Hutchins* (10 I. R. Eq. 453) is to the same effect. In that case the fraudulent appointment had been duly revoked, and the power exercised anew: but the latter appointment was held invalid; (see *ante*, p. 206).

Where the appointee repudiates the condition.

9. It is submitted that an appointment, made on the appointor's part for an improper purpose, but innocent so far as the appointee is concerned, is invalid although the

appointee, on being appealed to by the appointor to effectuate his purpose, refuses to do so.

From the Lord Chancellor's judgment (5 Ch. 58) it would appear that the second appointment to H. would have held good if the Court had been convinced that her conscience was not bound (the appointor had deposed that he had appointed *bonâ fide* without ulterior purpose). But in *Re Marsden* (4 Drew. 594), the appointment was made unconditionally, and the purpose of the appointor was not communicated to the appointee until afterwards. But the appointment was held void, and the appointee's petition for payment out of the fund appointed was dismissed, on the ground that the appointor's intention was to exercise the power in such a manner as to defeat the real purpose thereof. The Court said that it was not necessary that the appointee should have any previous knowledge, but the purpose of the donee must be matter of proof. In *Scroggs* v. *Scroggs* (Ambl. 272), the consent of a trustee was necessary to the exercise of a power, and the appointor obtained the trustee's consent by a false representation, to which the appointee does not appear to have been a party: yet the Court set aside the appointment.

But suppose (as Lord Cairns suggested, *arguendo*, 1 D. J. & S. 555) that the child to whom the appointment was made in *Wellesley* v. *Mornington* (2 K. & J. 143), had recovered, or, in that case, refused to carry the scheme into effect, could the appointment have been set aside? (and see *Daubeny* v. *Cockburn*, 1 Mer. 643). It is submitted that the appointment would be bad as against the persons entitled in default. If there was such evidence of the purpose of the appointor as the Court could take into its judicial cognizance, whoever the person may be who is ultimately benefited by the fraudulent execution of the power (*i.e.*, whether appointor or appointee), the appointment would be equally a fraud on the other objects or the persons entitled in default, if it was made for an improper purpose. "With regard to the interests of the wife and children of the defendant" (said Lord Eldon in *Huguenin* v. *Baseley*, 14 Ves.

273, 288, a case of undue influence), "there was no personal interference upon their part in the transactions that have produced this suit. If, therefore, their estates are to be taken from them, that relief must be given with reference to the conduct of other persons: and I should regret that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others. The case of *Bridyman* v. *Green* (2 Ves. sen. 627) is an express authority that it is within the reach of the principle of this Court to declare that interests so gained by third persons cannot possibly be held by them." So, too, in *Rowley* v. *Rowley* (Kay, 242), V.-C. Wood said that a bribe given by a third person to the appointor would vitiate the appointment. The question to be asked in each case is, Would the appointment have been made if it had not been for the improper intention of the appointor? What the Court acts upon is the fraud on the power in the exercise of it for purposes foreign to those for which it was created (1 D. J. & S. 569, 570). And the Master of the Rolls' remarks in *Topham* v. *Duke of Portland* (31 B. 541) have some bearing on the point:—"If the appointee refuses to give effect to the wishes of the appointor, he gets what it was never intended he should have, and enjoys property which, if his conduct could have been foreseen, might and probably would have been given to another. The case is exactly the same whether the consent or the agreement to act as desired be given or entered into before or after the appointment. The Court also would be placed in this dilemma: if it did not enforce compliance with the wishes of the appointor, it would be sanctioning the appointee in taking property never intended for him; and if the Court were to enforce it as binding in conscience on the appointee, the Court would enforce the execution of a power in favour of persons who were not objects of it." And if it be necessary to convict the appointee of fraud, there is not much difference morally between the person who joins in committing a fraud in its inception and the person who, though ignorant of the fraud in its inception, yet retains and

enjoys the fruits of it after he has become aquainted with its existence.

Distinction between motive and intention or purpose.

10. It has been seen (s. 4) that the Court will not advert to motive: but a distinction has been taken between motive and intention or purpose (*Vane* v. *Lord Dungannon*, 2 S. & L. 130).

The L. J. Turner (1 D. J. & S. 571) says:—"It is one thing to examine into the purpose with which an act is done, and another thing to examine into the motives which led to that purpose: and what we have to do is to look to the purpose of the act which was done, and not to the motive which led to it." This is adopted by L. C. Hatherley (5 Ch. 57), and he applies it to the case of *Topham* v. *Duke of Portland*, thus:—"If the duke, truly preferring H., either on the ground of her sister's supposed disobedience to her father's wishes in her marriage, or for any other reason, however capricious, intended simply to give the property to her in preference to her sister, he is by the power authorized to do so. If he, on the contrary, has not any such intention, but has executed the instruments with the intent that H., having the sole control of the fund, should abstain from dealing with it as her own, and should accumulate one moiety of it, in order (according to events) either to dispose of it for her sister's benefit, or to let it fall back according to the limitations in default of appointment, then I think that the distinction taken by L. J. Turner between intent and motive would apply. The difficulty of the case lies in this, that the intent is not always capable of demonstration. In cases where the nominal appointee has engaged beforehand to execute the unauthorized intent, another equitable principle, that of trust binding the conscience of the appointee, is introduced: but the existence of the intent on the part of the appointor, as evidenced by the communication to the appointee, after the appointment had been made, of a purpose inconsistent with the power, was, in *Re Marsden's Trusts*, held sufficient to vitiate the appointment, though the appointee had not, before the appointment, been privy to the arrangement." The result is somewhat curious; for, if the duke's anger against his sister had been so great as to induce him to exclude her entirely and absolutely by appointing to the other

sister, the appointment would have been good. But, as he wished to give her some benefit if she obeyed his wishes, his purpose was not within the power, and vitiated the whole appointment. The motive in either case would probably be annoyance at the sister's conduct; but the purpose in the former would be to benefit the other sister, and in the latter to compel obedience to his wish. It will be observed that, in criminal law, *per contrà*, it is the motive that makes the crime. A. shoots B. through the head deliberately, and knowing that the pistol is loaded, and that the wound will be mortal. His intention or purpose is obviously to kill B., but his motive may be robbery, or self-defence, or various other things, and the criminality or innocence of his act will depend thereon (see Stephen's Hist. of Crim. Law, vol. ii. p. 110).

Purchaser for valuable consideration without notice protected.

11. A purchaser for valuable consideration from the appointee who has acquired the legal estate without notice is not affected by the fraudulent execution of the power. Any notice to affect such a purchaser must be actual, not constructive, notice.

In *M'Queen* v. *Farquhar* (11 Ves. 467), estates were limited to the use of A. for life, with remainder to the use of his wife for life, and the settlement contained an exclusive power of appointing among children, also created by way of limitation of uses. A. entered into a contract for the sale of the estates, and afterwards appointed the fee (subject to the life estates of himself and his wife) to his eldest son: and the three thereupon conveyed the estate to the purchaser in consideration of a sum expressed to be paid to all of them. Lord Eldon overruled an objection that the appointment appeared to have been made in pursuance of a previous agreement, and that if A. derived any benefit from that agreement, which seemed probable, or even if he had previously stipulated that his son should join him in the sale, which seemed most probable, it would be a fraudulent execution; (and see *Green* v. *Pulsford*, 2 Beav. 70; Sug. Pow. 616; *Cockcroft* v. *Sutcliffe*, 25 L. J. Ch. 313; *Hamilton* v. *Kirwan*, 2 J. & L. 393; *Rhodes* v. *Cook*, 2 S. & S. 488; *Re Huish's Charity*, 10 Eq. 5).

In *Warde* v. *Dixon* (28 L. J. Ch. 315), the appointed fund was a reversionary interest in consols, standing in the names of trustees; and the purchaser therefore got no legal estate. The V.-C. held that the circumstances raised such grave suspicion that he dismissed with costs the vendor's bill for specific performance of a contract to purchase the appointed interest. In *Askham* v. *Barker* (17 B. 37), the property appointed was also a reversionary interest in personal estate: but the M. R. came to the conclusion on the facts that there was no fraudulent purpose.

But not if he have notice.

But it will be otherwise if the purchaser have actual notice of the fraud.

In *Hall* v. *Montague* (8 L. J. Ch. O. S. 167), a father, the donee of a power of appointment among his children, agreed, three years before his eldest son attained twenty-one, to sell part of the settled estates to A.; and he covenanted with A. that he, his wife, and such of his children as he should appoint to, would, within three months after their eldest child should attain twenty-one, convey to A.; the purchase-money was to be paid to the father. An appointment to a child and a conveyance by the parents and such child were accordingly made to the purchaser. This whole transaction was set aside nearly thirty years after, at the suit of the younger children. Sir John Leach, in considering the question whether A. was affected with notice, said that the agreement provided that the purchase-money should be paid to the father, and the agreement was with the father alone. In *M'Queen* v. *Farquhar* (11 Ves. 467), there was not sufficient evidence to show that the purchaser knew that the purchase-money was to be applied for the benefit of the father alone. The purchaser might very reasonably (Lord Eldon thought in that case) infer that the son was to take his fair proportion of the value of the reversion; but could anybody reasonably infer, in the case before the Court, that the son was to have the benefit of his fair proportion? or that A. was not aware that the money, though nominally paid to the father, wife, and eldest son, was really paid to the father? In the first place there was A.'s covenant that it should be paid to the father; and, in the next, the conveyance to A. did not recite the truth of the case. He did not

suppose that A. was *personally* a party to the fraud; but those who drew the conveyance knew that it was a fraudulent transaction. He was of opinion that all who claimed under it were affected by the fraud of the transaction. The case of *Palmer* v. *Wheeler* (2 B. & B. 18), is treated by Lord St. Leonards as an authority to the same effect: but it is to be observed that in that case the appointee was absolutely entitled in default of appointment; and the case appears to be one rather of undue parental influence than of fraud on a power; (see *Skelton* v. *Flanagan*, 1 I. R. Eq. 362, at p. 371).

Issue of marriage cannot support fraudulent appointment.

A fraudulent appointment made on the marriage of the appointee will be set aside; and the issue of the marriage cannot protect themselves on the ground that they were purchasers for value (Sug. Pow. 617; *Conolly* v. *Macdermott*, Sug. H. L. 513; *Re Nash*, 5 Ir. Ch. R. 384).

Purchase must be from appointee.

And of course the purchase must be from an object of the power of a share appointed to him, and not from the appointor. The payment of a money consideration cannot make a stranger become the object of a power created in favour of children: he can only claim under a valid appointment executed in favour of some or one of the children (*Daubeny* v. *Cockburn*, 1 Mer. 626).

Appointments cannot be severed.

12. It is in most cases impossible for the Court to sever appointments which are fraudulent; such appointments are, as a general rule, void *in toto;* for the Court cannot know whether the power would ever have been exercised if it had not been for the corrupt purpose. Where there is an appointment made by a father to a child of a given sum of money, out of which he is to be paid something for making it, it is quite impossible to separate the appointment by dividing it into two parts, and to say, so far as the donee was guided by his wish to provide for his child, it is good, and therefore the Court will support it; but so far as he wished to benefit himself from the fraud, it is bad; because the party in remainder might say that the donee was not actuated in the appointment by love to his child or by the wish to provide for him, or, at all events, it was so mixed up with his own benefit that it was impossible in any way to sever the two purposes and to say how much was to be attributed to

the one and how much to the other; and therefore the purpose for his doing the act at all being a desire to benefit himself was fraudulent, and the subsequent act depending upon that purpose must be set aside (*Rowley* v. *Rowley*, Kay, 263). Thus, if a man have a power of appointment among children, and he appoint 3,000*l.* to one child on an agreement to take back 1,000*l.*, the appointment will not be good as to 2,000*l.*, but will fail *in toto*. The general rule is that

> Appointments cannot be severed, so as to be good to the extent to which they are *bonâ fide* executions of the power, but bad as to the remainder, unless (1) some consideration has been given which cannot be restored, or (2) the Court can sever the intentions of the appointor, and distinguish the good from the bad (*Daubeny* v. *Cockburn*, 1 Mer. 626; *Topham* v. *Duke of Portland*, 1 D. J. & S. 517).

And the fraud may run through several appointments and infect them all: in such a case, if all the appointments appear to be part of one fraudulent design, all will be set aside (see *Askham* v. *Barker*, 12 B. 499; *Farmer* v. *Martin*, 2 Sim. 502; *Agassiz* v. *Squire*, 18 B. 431).

Cases of absolute appointment with a condition annexed must, however, be distinguished. It might perhaps have been thought that an express condition stated in the appointment was as much a sinister or bye purpose as an unwritten understanding, binding only in honour between appointor and appointee. But it is well settled that where there is an appointment to an object of the power, coupled with conditions which are in excess of the power, the appointment is valid, and the appointee is entitled to enjoy the appointed property free from the conditions (*ante*, p. 298). "The authorities, of which *Carver* v. *Bowles* (2 R. & M. 301) is an example, have determined (on principles which, if sound in England, must be equally so in Scotland) that an ulterior purpose of this kind, which is *ultra vires* only and not also a fraud

on the power, though it may have operated as a motive for the appointment in the mind of the appointor, will nevertheless not prevent an object of the power from taking for his own benefit the estate appointed to him, if the words used, according to their proper construction (which must itself be independent of any peculiar doctrines of law applicable to powers), are sufficient to execute the power and to vest the property in the appointee" (*per* Lord Selborne, *Macdonald* v. *Macdonald*, L. R. 2 Sc. & D. 482, 492; but see *Re Perkins*, 41 W. R. 170, *sed qu.*). It is submitted that the meaning of the qualification "and not also a fraud on the power," is that there is not also a corrupt bargain or understanding to the effect of the condition: the express insertion of the condition will not validate an appointment which would otherwise be a fraud on the power.

Three classes of cases.

V.-C. Wood, in *Rowley* v. *Rowley* (Kay, 242, 258), distinguishes three classes of cases thus:—

First class of cases.

"With regard to the position of this doctrine as to powers, there are three different and distinct classes of cases. There is, first of all, the case in which there may be a fraud on the donor of the power, or those who claim under him, by the person who takes the fee simple or other estate which is the subject of the power. There may be cases in which the fraud is on him alone, there being only one person interested in the charge which may have been created, as in the case of a jointure, and many other similar cases, such as, for example, a power of raising a given sum of money out of a given estate, for a single individual; and if the power be exercised, so as to enable the donee of the power to raise money upon it for a purpose of his own, it is a fraud upon the donor of the power and the party claiming through him that any part of that sum should be raised for any purposes except those prescribed by the power.

Second class of cases.

"A second class of cases is where the fraud may be wholly on the parties who are interested in the distribution of the fund and cannot be in any way a fraud upon the donor of the power, that is, the charge would remain whether the power be exercised or not, but the distribution of the fund would be the only point in question. That is the case I have before me. It is a case in

which 30,000*l.* would be necessary to be raised, whether there were any appointment under the power or not; and therefore the fraud, if any, is one which would affect the persons only who are interested in the distribution.

Third class of cases.

"There is also a third class of cases, which comprehends both the classes I have just mentioned, namely, where the power is to create a charge as well as to distribute it under certain circumstances, or to particular individuals, in which case it would be a fraud to have the power exercised at all if the circumstances had not arisen, or for the benefit of parties who were not interested in it and who were not intended to be interested in it. The owner of the estate in the last class of cases would be entitled to say, it never was intended to be distributed except in a fair, upright, and honest manner, as between all parties interested in the charge."

First class of cases. Exception.

With regard to the first class of cases, an exception has been established in favour of jointures.

In *Lane* v. *Page* (Ambl. 233), the donee of a power to jointure, being in debt, executed his power to its full extent previously to his marriage. He had agreed with his future wife that she should join in levying a fine, the use of which was partly for the wife's benefit and partly for the payment of his own debts. The execution was set aside so far as related to the husband's debts, but was supported so far as it was for the wife's benefit. In this case, the subsequent marriage was a consideration that could not be restored, and the case might have been decided on that ground. In *Baldwin* v. *Roche* (5 I. R. Eq. 110), a tenant for life with power of jointuring married without exercising his power. His wife had real estate, which was settled on the husband during the joint lives of himself and his wife, with remainder to the wife during her life. The husband, becoming indebted, agreed with his wife and the creditor that he would exercise the power of jointuring in her favour, and that she should grant to the creditor an annuity for his life, equal to the amount of the jointure, to be charged on her estate and to become payable on the death of the husband. This was done, and was held to be a valid appointment of the jointure. In *Aleyn* v. *Belchier* (1 Eden, 132), the power was executed

after marriage. It is to be observed, however, that in this case the bill contained a submission to pay the jointure so far as the power was executed *bonâ fide* for that purpose, and only sought relief against the other objects of the appointment. However, V.-C. Wood says, that in the case of a power to jointure, nobody is interested but the one party, the jointress (*sed qu.*); and therefore, if the charge be raised under a corrupt bargain, or one by means of which some benefit is to be handed over to the husband, the Court will, and it has done so in several cases, sever the appointment and hold it to be good to the extent to which the jointress is entitled, but will hold it to be bad with reference to the corrupt and improper use that may be made of the surplus. He remarks, however, on the difficulty of reconciling this with the general rule, but agrees with Lord St. Leonards (Pow. 612) that the doctrine as to jointures is not likely to be now disturbed (Kay, 259). In *Whelan* v. *Palmer* (39 Ch. D. 648), however, where under a jointuring power an appointment was made on a corrupt bargain with the jointress to provide thereout for a stranger, the whole appointment was held bad by Kekewich, J., as a fraud on the power.

Second class of cases.

Where the subject-matter of the power is in existence, and the donee of the power has merely to select the objects or to distribute the fund among them, an appointment to one object, which is for any reason fraudulent, does not necessarily vitiate appointments to other objects. If the particular appointment which is fraudulent is one complete independent act, other appointments to other objects, although made by the same deed, will not be affected. In the words of Lord Hardwicke (Ambl. 235), "Fraud will affect only so far as it extends;" but the bounds between the good and the bad must be clearly defined, in order that part of the appointment may prevail.

"In the case of distribution among several objects of a power, where there is a clear right in all the parties interested in the distribution, it is a novel thing to say that the fund is to be considered as one gross fund, which is to be fairly apportioned among the different persons interested, and that, to the extent to which the donee of the power takes out of the common fund,

any portion whatever from which he is himself to receive a benefit, to that extent he has diminished the common fund, which ought to be appropriated amongst all, and having diminished it to that extent, the Court will not permit him to have any further power over it, but will consider the right of the other parties to be determined as from that moment, the object of the donor being to have a fair and equal distribution of it. All the cases that have happened have been cases confined expressly to the mode of dealing with those shares which have been taken out of the common fund by means of the corrupt bargain. I find no case applying at all to the balance of the fund which remains after that share has been so taken out. The Court has said, that share at least we will bring back: and all the cases have gone to that extent and no further. There is no decided case in which a father, having power of making a distribution among eight or nine children, having made a corrupt bargain with one of those children, the appointments to the other children have therefore been set aside" (*per* V.-C. Wood, *Rowley* v. *Rowley*, Kay, 261).

In that case, a husband and wife lived apart, and the wife had the care of one of their two younger children. The husband being desirous of raising money by mortgage of his settled estates, and being unable to do so on account of the existing charges thereon, applied to his wife to postpone her pin-money and jointure annuities to his proposed mortgages. The wife consented, provided that the husband would exercise a power of appointment which he had over a sum of 30,000*l.* in favour of his younger children, to the extent of appointing 5,000*l.* to the child under her care. He did so, and by a similar deed dated the next day, reciting the former appointment, he appointed the rest of the fund to his only other younger child. It was held that, although the bribe to the husband would affect the validity of the appointment of the 5,000*l.*, yet that the appointment of the 25,000*l.* was not so connected with the former appointment as to be also invalid; nor, indeed, was the motive for the latter appointment the same as in the former case, for, instead of being an inducement to the wife to consent to the proposed arrangement,

the second appointment, if revealed to her, would probably have prevented her concurring and postponing her pin-money and jointure; (and see *Harrison* v. *Randall*, 9 Ha. 397).

When single appointments are severable.

An appointment of a gross sum to one object may be upheld as to part, if the evidence is such as to enable the Court to distinguish what is attributable to a proper from what is attributable to an improper purpose.

In *Topham* v. *Duke of Portland* (1 D. J. & S. 517; 11 H. L. C. 32), the donee of a power of appointing portions among his younger children appointed a double share to a younger child without previous communication with him. But it appeared from the instructions for the appointment, that its purpose as to half of the double share was not authorized by the power. It was held that such purpose vitiated the appointment as to the moiety only. L. J. Turner (p. 572), said that the general rule (that where an appointment is made for a bad purpose, the bad purpose affects the whole appointment) applied to cases in which the evidence did not enable the Court to distinguish what is attributable to an unauthorized from what is attributable to an authorized purpose. But if the evidence enabled the Court to make the distinction, the foundation on which the rule rests, viz., the impossibility of distinguishing what is attributable to one purpose from what is attributable to another, wholly failed, and the general rule could not apply.

In *Ranking* v. *Barnes* (33 L. J. Ch. 539; 12 W. R. 565), the donee of a power of appointment among children appointed two-sixths to a married daughter, with a view of enabling the daughter's husband, with one-half of the appointed fund, to pay a debt which he had incurred on account of his wife's brother, an object of the power. The appointment was held invalid, but only as to one moiety.

Third class of cases.

The third class of cases mentioned by V.-C. Wood (viz., where the subject-matter of the appointment has both to be called into existence and to be distributed) will be subject to the rules above stated, according to the circumstances of each case. Thus, under a power of raising and exclusively appointing 10,000*l.* to children, if the whole sum was raised and appointed on a corrupt bargain,

it would be void as well as to the raising as to the appointment. But if part only were corruptly appointed, the taint in that part would not vitiate a good appointment of the rest (as before stated), and it follows that the direction to raise would not be invalid as to the whole sum, but only as to so much thereof as was improperly appointed (see *post*, "Powers of Charging").

Fraudulent releases, so-called.

13. It is well settled (see *ante*, p. 15) that limited powers may be effectually and absolutely released, so that the releasor cannot afterwards change his mind and appoint (*Smith* v. *Plummer*, 17 L. J. Ch. 145). In *Cunynghame* v. *Thurlow* (1 R. & M. 436, n.), a fund was limited to a father for life with remainder to his children in such shares as he should appoint, and in default of appointment to the children equally. The father released his power as to a part of the fund so as to vest it in himself as the personal representative of a deceased son. V.-C. Shadwell, although of opinion that the power was extinguished by the release, refused to give present effect to the release so far as it operated to vest a share of the fund in the father. It is difficult to see what jurisdiction the Vice-Chancellor had to refuse to give effect to the rights of the administrator, or what useful purpose was served by retaining the fund. The case has been often doubted; and in 1868, the late V.-C. Wickens, when at the bar, advised that in his opinion the case was not a binding authority, although it would probably be necessary to go to the Court of Appeal to overrule it. It was tacitly not followed in *Smith* v. *Houblon* (26 B. 482), where the donee of an exclusive power of appointment among children over a fund which, in default of appointment, was limited to them equally, was beneficially entitled, in default of any appointment by himself, to one-third of the fund as representative of a deceased child. He assigned the said third share to his mortgagees and released his power. It was held that the power was effectually released, and the rights of the parties consequent thereon were declared. And it has now been held by the Court of Appeal (*Re Radcliffe*, (1892) 1 Ch. 227), that where the administrator, by his counsel at the bar or otherwise, releases his life interest, he is entitled to be paid the share which thereby falls into possession. Inasmuch

as the administrator who asks for immediate payment necessarily gives up the life interest which exists only so long as the trust property remains with the trustees, this decision in effect overrules *Cunynghame* v. *Thurlow*. Indeed, it may be doubted whether there can be such a thing as a fraudulent release: it might very well have been held that limited powers, especially if testamentary only, could not be released at all (see V.-C. Kindersley's judgment in *Coffin* v. *Cooper*, 2 Dr. & Sm. 365), but the contrary is well settled, and the release of powers has now been authorized by the legislature (Conveyancing Act, 1881, s. 52, sub-s. 1); and the reasons for saying that a release is fraudulent are really reasons for saying that the power cannot be released at all.

It may, however, well be that if the Court is called upon to exercise its judicial discretion in other respects (*e.g.*, under sect. 39 of the Conveyancing Act, 1881), it may take into consideration the object of the release and refuse to assist in giving effect to it (*Re Little, Harrison* v. *Harrison*, 40 Ch. D. 418).

It is of course clear that the persons entitled to a reversionary interest, and to the life estate preceding it, being all *sui juris*, can combine so as to say that, before the time limited by the settlement comes, the trustees shall pay over the trust fund (*Anson* v. *Potter*, 13 Ch. D. 141). In such a case, however, the trustees must see that all duty (if any) payable on the cesser of the life interest, is paid before they part with the funds.

CHAPTER XI.

DELEGATION AND SURVIVORSHIP OF POWERS.

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Delegation

1. In considering the delegation of powers, the distinction between powers amounting to absolute ownership, powers implying personal discretion, and powers to do acts merely ministerial, must be borne in mind.

In *Combes' Case* (9 Rep. 75), the things which a man cannot do by attorney, *i. e.*, the acts which he cannot empower another to do for him, are considered. "If a man has a bare authority coupled with a trust, as executors have to sell land, they cannot sell by attorney: but if a man has authority as absolute owner of the land, there he may do it by attorney. . . . Also there is a difference betwixt a general absolute power and authority as owner of the land, as aforesaid, and a particular power and authority (by him who has but a particular interest) to make leases for life or for years. And therefore if A. be tenant for life, the remainder in tail, &c., and A. has power to make leases for twenty-one years, rendering rent, &c., he cannot make a lease by letter of attorney by force of his power, because he has but a particular power which is personal to him, and so was it resolved in *Lady Gresham's Case* (24 Eliz.), by Wray and Anderson, C. JJ."

The rule is that

> A power involving the exercise of personal discretion by the donee cannot be delegated; *delegatus non potest delegare* (Sug. Pow. 179). *Delegatus non potest delegare.*

The attempted delegation of such a power is a mere nullity, the insertion of which in no way affects the validity of estates or interests limited in default of its execution; for, as the delegated power cannot be effectually exercised, the estates or interests in default of its exercise remain indefeasible. But trustees do not, of course, delegate their powers by consulting with experts, or with their beneficiaries, and by allowing their arguments to influence their conduct. Their duty is to exercise their discretion, and to put themselves in the best position possible for the purpose of exercising that discretion. Trustees may freely discuss with the beneficiaries the reasons for and against a particular decision, without running the risk of being held to act against their own judgment, if they should in the end disregard objections to which they had thought it right in the first instance to direct attention (*per* Lord Selborne in *Fraser* v. *Murdoch*, 6 Ap. Ca. at p. 864). Trustees may consult their beneficiaries or experts.

In *Ingram* v. *Ingram* (2 Atk. 88), A. had power under a settlement to dispose of an estate in such proportions as he should think fit among the issue of his marriage. By his will he delegated this power to his wife to exercise as she should think fit, with a gift over in default of appointment. The power was held to be exerciseable by the husband only, and not in its nature transmissible or delegatory to a third person: the attempted delegation was expunged, and the remainders over in default of the execution of the delegated power took effect.

In *Chester* v. *Chadwick* (13 Sim. 102), power was given to A. to appoint among his children in such proportions, &c., as he should think fit, and A. appointed by his will that his wife should receive the dividends during her life and apply the same in the exercise of her sound discretion for the best interest and

advantage of his children; this was held not a good execution; (and see *Alexander* v. *Alexander*, 2 Ves. sen. 640; and *Attorney-General* v *Berryman*, cited *ibid.* 643).

In *Carr* v. *Atkinson* (14 Eq. 397), the donee of a power of appointment among issue appointed a life interest to A., a child, and then purported to give a power to that child to appoint a life interest to any husband with whom she might intermarry, and subject thereto, appointed the corpus of the property to the children of A. The Master of the Rolls said that the power to appoint in favour of the husband failed, being a delegated power which could not be given by the person who was entitled to exercise the first power, and the will was to be read as if the words relating to it formed no part of it, and the construction of the rest of the will was not affected by it. And it makes no difference whether the objects of the delegated power are or are not objects of the original power (*Williamson* v. *Farwell*, 35 Ch. D. 128, 141). It is the delegation which is objectionable in itself, and it is immaterial to whom or in whose favour the attempt to delegate is made; (and see *Webb* v. *Sadler*, 8 Ch. 419; *Stockbridge* v. *Story*, 19 W. R. 1049; *Burnaby* v. *Baillie*, 42 Ch. D. 282, *ante*, p. 269).

The limits and applicability of the maxim were considered by the Court of Appeal in *De Bussche* v. *Alt* (8 Ch. D. 286) (a case of agency); and at p. 310 it is said: "As a general rule, no doubt, the maxim '*Delegatus non potest delegare*' applies so as to prevent an agent from establishing the relationship of principal and agent between his own principal and a third person; but this maxim when analysed merely imports that an agent cannot, without authority from his principal, devolve upon another obligations to the principal which he has himself undertaken to personally fulfil; and that, inasmuch as confidence in the particular person employed is at the root of the contract of agency, such authority cannot be implied as an ordinary incident in the contract. But the exigencies of business do from time to time render necessary the carrying out of the instructions of a principal by a person other than the agent originally instructed for the purpose; and where that is the case, the reason of the thing requires that the rule should be relaxed, so as, on the one

hand, to enable the agent to appoint what has been termed a 'sub-agent' or 'substitute' (the latter of which designations, although it does not exactly denote the legal relationship of the parties, we adopt for want of a better and for the sake of brevity); and, on the other hand, to constitute, in the interests and for the protection of the principal, a direct privity of contract between him and such substitute. And we are of opinion that an authority to the effect referred to may and should be implied, where, from the conduct of the parties to the original contract of agency, the usage of trade, or the nature of the particular business which is the subject of the agency, it may reasonably be presumed that the parties to the contract of agency originally intended that such authority should exist, or where, in the course of the employment, unforeseen emergencies arise which impose upon the agent the necessity of employing a substitute." It must, however, be remembered that these observations apply to the case before the Court, *i. e.*, a case of agency for the sale of a ship: and it must not be assumed that a trustee, who was under the necessity of going abroad on business or for health, would be thereby justified in delegating the execution of his trust to anyone else.

Delegation of power to consent.

A person whose consent is required to the execution of a power cannot, by a general power of attorney given to another to consent for him to any deed which the attorney shall think fit, effectually delegate his power of consent: but the execution of the power will be altogether void (*Hawkins* v. *Kemp*, 3 East, 410).

Exception.

But it seems that a trustee in England, entrusted with the management of property abroad, may execute such trust by attorney, without special authority: the exception arising out of the necessity (*Stuart* v. *Norton*, 9 W. R. 320).

Trustee for sale cannot delegate in order to buy the trust estate.

But the rule that prohibits a trustee from buying from himself is not such a necessity as will authorize the delegation of his power to his co-trustees. In *Bulteel* v. *Lord Abinger* (6 Jur. 410), one of three trustees, knowing that his son was in treaty for the purchase of the trust estate, wrote to the acting trustees that he would not take any interest, either directly or indirectly,

in the matter. The acting trustees thereupon contracted to sell to a third person. In a suit for specific performance, the Court held that the acting trustees had no authority to enter into the contract; and it was also said that the third trustee could not delegate to his co-trustees an authority to sell to his son, without reserving to himself a veto upon the contract.

Power of corporation to delegate.

A corporation with no express power of electing corporators has an implied power to secure perpetual succession by voluntary elections *ad libitum;* and it is competent for them to delegate this power to a select part of themselves; but they cannot delegate it to a stranger (*R.* v. *Bird*, 13 East, 367); and the majority of such selected members can, if the meeting be duly summoned, bind the minority (*R.* v. *Monday*, Cowp. 530; *R.* v. *Varlo*, *ib.* 248; *Smyth* v. *Darley*, 2 H. L. C. 789).

Powers under S. L. Act.

Under sect. 50 of the Settled Land Act, 1882, the powers under the Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being by operation of law or otherwise an assignee of a tenant for life.

Cases of trusts for sale, as contrasted with powers of sale, must be distinguished. As to the former, see Dart, V. & P. 6th ed. 682; and Conveyancing Act, 1881, s. 30, amended as to copyholds by 50 & 51 Vict. c. 73, s. 45.

Power of leasing requires discretion.

There cannot usually be much doubt whether a power involves the exercise of discretion or not: it may be observed, however, that a power of leasing is a trust power requiring discretion in its exercise. In the execution of the duty or office of granting leases, much judgment is required to be exercised; the fitness and responsibility of the lessee, the adequacy of the rent, the length of term to be granted under the circumstances, and the nature of the covenants, stipulations, and conditions which the lease should contain, are matters requiring knowledge and prudence. The power to lease may be a trust power in the sense of its being the duty of the trustee to avail himself of it under proper circumstances; but it is to be exercised by a person selected for the purpose, and not by any other person (*per* Lord Westbury in *Robson* v. *Flight*, 4 D. J. & S. 614). The same remarks apply to some extent to powers of sale.

Powers operating under the Statute of Uses must be strictly construed, and must be executed by the person named. One of the cardinal principles of the law of uses is this, that a new use will not arise unless the conditions and terms on which it is to come into being are strictly followed. The Court has no power to alter the effect of a settlement made under the statute. If an estate has been once settled in a course of legal devolution under the statute, the only method (other than the exercise of the statutory powers) by which those uses can be abrogated is by the exercise of a power reserved in the settlement of revoking those uses: such a power is a power in derogation of what has been already done, and must be strictly pursued. "Where there is a conveyance by lease and release to uses, with power to alter the uses by an instrument, the terms and limitations of which are prescribed by the general law, the new use will not arise except under the very circumstances in which it is contracted that it shall arise" (*per* Lord Eldon, *M'Queen* v. *Farquhar*, 11 Ves. 475).

Powers operating under the Statute of Uses.

Accordingly, a power of sale and of limiting new uses in a settlement given to A. and B. and the survivor of them, and the executors and administrators of such survivor, could not be exercised by a trustee appointed by the Court before Lord Cranworth's Act (23 & 24 Vict. c. 145, s. 27) (*Newman* v. *Warner*, 1 Sim. N. S. 457; but see *Brassey* v. *Chalmers*, 4 D. M. & G. 528; and Conveyancing Act, 1881, s. 33).

2. A power to do an act merely ministerial, and involving no personal discretion, may be delegated.

Power to do acts merely ministerial.

Lord St. Leonards (Pow. 180) says that it has been contended that a donee of a power cannot execute a deed of appointment by attorney: but the cases do not authorize the position. They merely establish that the donee cannot delegate the confidence and discretion reposed in him to another. Where the deed of appointment is actually prepared, or the donee points out the precise appointment which he is desirous should be made, there no confidence, no discretion, is delegated. The appointment is

in every respect an exercise of his own judgment; and there cannot be any reason why he should not be permitted to execute the deed of appointment by attorney. The contrary doctrine would lead to great inconvenience. Where, however, a particular mode of execution is required, it would be difficult to support an execution by attorney. This possible exception would appear to be met by 22 & 23 Vict. c. 35, s. 12 (*ante*, p. 134), so far as regards appointments by deed since 13th August, 1859.

Accordingly, a trustee with the legal estate may appoint an attorney merely to pass that legal estate, that being an act which involves no discretion. In *Attorney-General* v. *Scott* (1 Ves. sen. 413, 417), twenty-five trustees had power to elect a clergyman: the Lord Chancellor said that they could not make proxies to *vote:* but if the choice was regularly made, they might make them for the purpose of signing the presentation.

In *Offen* v. *Harman* (29 L. J. Ch. 307), trustees had power to consent to the substitution of other estates for the settled estates: they were made parties to a deed for carrying out such substitution, and saw and approved of the draft thereof. The execution of such deed by one of them by attorney was held valid. This point is not noticed in the report of the case in 1 D. F. & J. 253, nor is it expressly mentioned in the judgment of the Court.

Guardianship of infant.

And a father may exercise the power given him by 12 Car. 2, c. 24, s. 8, of disposing by will of the custody of his child, by giving authority to a surviving guardian to nominate a person in the place of one who has died (*In b. Parnell*, L. R. 2 P. & D. 379). And under 49 & 50 Vict. c. 27, s. 3, the mother has power to appoint a guardian or guardians of her infant children in certain cases (see *Re G*——, 1892, 1 Ch. 292).

Powers equivalent to ownership.

3. The maxim *delegatus non potest delegare* does not apply to the case of a general power equivalent to absolute ownership.

If a man has a power of sale as absolute owner of the land, he may sell by attorney (*Combes' case*, 9 Rep. 75). It is clear

that when a person has an absolute power of appointment, he may appoint to certain persons or classes of persons in such shares as another person shall nominate (*White* v. *Wilson*, 1 Drew. 304). So, where an estate stands limited to such uses as A. shall appoint, an appointment by A. to such uses as B. shall appoint will be valid and effectual to pass the legal estate (Sug. Pow. 195).

Powers of executors over personalty.

Hence, as an executor is regarded, both at law and in equity, as the absolute owner of the testator's personal property, it has been held that an executrix may assign and give a valid power of attorney to collect debts due to the testator (*Earl Vane* v. *Rigden*, 5 Ch. 663).

In *Russell* v. *Plaice* (18 Beav. 21), the Master of the Rolls held that a mortgage of leaseholds by an executor or administrator might well contain a valid power of sale—such a power is not to be considered as the delegation of a power entrusted to the executor, but as the creation of a new power to sell, not for the benefit of the persons interested in the testator's estate, but for the benefit of the person interested in the mortgage, that is, a power to render the mortgage effectual. The right to create this power is incidental to the authority of the executor to mortgage. This may be considered as overruling *Sanders* v. *Richards* (2 Coll. 568).

In *Cruikshank* v. *Duffin* (13 Eq. 555), an executor borrowed money for executorship purposes from a building society, and gave a mortgage of his testator's leaseholds with a power of sale and the usual incidents of a building society mortgage; it was held that a good title could be made by the mortgagees under this power. But where an administrator thirty-six years after the death of the intestate raised money for the alleged purpose of repairing leaseholds, but the Court considered that the money was in fact raised for the beneficial enjoyment of the administrator, and that the mortgagee had notice thereof, the mortgage was held bad (*Ricketts* v. *Lewis*, 20 Ch. D. 745. The head-note in the report of this case seems too widely expressed).

Does a power to mortgage authorize a

4. It was at one time doubted whether a power to raise money by mortgage authorizes the donee to give a mortgage

mortgage containing a power of sale?

with a power of sale: but the balance of authority and convenience is in favour of the insertion of the power of sale. In the absence of any expression of a contrary intention, it may be fairly said that the creator of the power meant that the mortgage which he authorized should contain all usual and necessary powers: amongst these a power of sale is most important: the objection that the power of sale in a mortgage is a delegated authority is thus answered; for it comes not from the donee, but from the donor of the power to mortgage. However, in *Clarke* v. *Royal Panopticon* (4 Drew. 26), the council of a company were authorized by a general meeting to raise money by mortgage: the articles of association directed that money should not be raised by sale or mortgage without the authority of a general meeting. V.-C. Kindersley held that the council had no power to give a mortgage containing a power of sale. He said that, although a special power to sell might authorize a mortgage, yet a power to mortgage does not comprise a power to give authority to sell; and that if a special power, involving an exercise of personal judgment is given to trustees, it is not competent to them to delegate that power: and he said that if a power to mortgage comprised as an incident a power to give authority to sell, then it would follow that a trustee, who has a power to mortgage, has a power to sell, or, at least, can delegate to another a power to sell. He further said that in 1857 it was by no means the universal practice to treat a power of sale as a necessary incident to a mortgage, but he admitted that it was much more usual then than it was thirty or forty years before; (and see *Drake* v. *Whitmore* (19 L. T. O. S. 243), where V.-C. Parker in 1850 declined to permit the insertion of a power of sale in a mortgage-deed to raise money ordered to be raised by the Court.)

But although perhaps a power of sale is not so necessary an incident to a mortgage as to make it a breach of trust in a trustee (*Farrar* v. *Barraclough*, 2 Sm. & G. 231), or dereliction of duty in an attorney (*Bailey* v. *Abraham*, 14 L. T. O. S. 219), to take a mortgage without such a power, yet a power of sale in default of payment is now "regularly made a part of every mortgage,

and, as such, is inserted by the draughtsman without special instructions" (Davidson, ii. pt. 2, 66, 4th ed.). It is moreover for the mortgagor's benefit: for it increases the security, and therefore makes the loan more readily obtainable. It was given to the mortgagee by statute 23 & 24 Vict. c. 145, and is now given by the Conveyancing Act, 1881, s. 19; and at no time could the mortgagor have escaped foreclosure, (or sale in lieu thereof under 15 & 16 Vict. c. 86, s. 48, and Conveyancing Act, 1881, s. 25,) in case of default in payment.

The later authorities are all in favour of the insertion of a power of sale. In *Re Chawner's Trusts* (8 Eq. 569), V.-C. Malins declined to follow the authority of *Clarke* v. *Royal Panopticon*. In the case before him, a testator devised an estate to trustees, and directed them to raise a sum of money by mortgage of the estate in such manner as they should think fit. The Vice-Chancellor was of opinion that the trustees were authorized to give a power of sale in their mortgage, that such a power is a necessary incident to a mortgage, and that when a testator says that money is to be raised by mortgage, he means it to be raised in the way in which money is ordinarily raised by mortgage, and therefore that the mortgage might contain what mortgages in general do contain, a power of sale.

In *Cook* v. *Dawson* (29 Beav. 123), the Master of the Rolls, in holding that a power to mortgage real estate did not authorize a direct sale, said (p. 128), "It is true that a power to mortgage includes a power to give to a mortgagee all such remedies as are proper to be given to him so as to mortgage the estate on the best terms, and authorizes giving to the mortgagee a power of sale." And in *Bridges* v. *Longman* (24 Beav. 27), where a settlement empowered trustees to raise money by sale or mortgage, he held that no objection could be taken before him that the power of mortgaging was executed by means of a mortgage which contained a power of sale, "because such a power is incident to the power to mortgage, unless expressly excluded"; (and see *Bennett* v. *Wyndham*, 23 B. 521).

In *Selby* v. *Cooling* (23 B. 418), the same judge authorized the insertion of a power of sale in a mortgage of an infant's real

estate made by order of the Court, with the qualification "if the mortgagee should require it."

Where purchase deed is ordered to stand as a mortgage only.

But where a purchase deed is set aside by the Court on the ground of the fiduciary relation between the parties, and ordered to stand as a mere security for the money advanced, the Court will not import into the transaction a power of sale; for the property might thereby be lost by a sale from the first purchaser to a second (*Pearson* v. *Benson*, 28 B. 598).

Involuntary delegation. Bankruptcy.

5. The Bankruptcy Act, 1869 (32 & 33 Vict. c. 71, s. 15, sub-s. 4), enacted, and the Act of 1883, s. 44, enacts, that the property of the bankrupt divisible among his creditors shall comprise—

The capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or before his discharge, except the right of nomination to a vacant ecclesiastical benefice. By s. 17 of the Act of 1869, and s. 54 of the Act of 1883, such property shall, on the appointment of a trustee, forthwith pass to and vest in the trustee appointed; and by s. 25 of the Act of 1869, and s. 56 of the Act of 1883, the trustee shall have power to exercise any powers the capacity to exercise which is vested in him under the Act, and to execute all powers of attorney, deeds, and other instruments expedient or necessary for the purpose of carrying into effect the provisions of the Act. But sub-s. 5 of s. 1 of the Married Women's Property Act, 1882, does not enable the trustee in bankruptcy to exercise the general powers of a married woman (*Ex parte Gilchrist, Re Armstrong*, 17 Q. B. D. 521). That sub-section only subjects her separate property to the bankruptcy law; and power is distinct from property.

Powers exerciseable by will only do not pass to the trustee: for such a power is purely personal: no other man can make my will (Sug. Pow. 188; *Smith* v. *Wheeler*, 1 Ventr. 128; *Nichols to Nixey*, 29 Ch. D. 1005).

Judgments.

By 1 & 2 Vict. c. 110, s. 13, it is provided, that a judgment entered up against any one shall operate as a charge upon all

lands, tenements, rectories, advowsons, tithes, rents, and hereditaments (including copyholds), over which he shall have at the time of entering up such judgment, or afterwards, any disposing power which he might, without the assent of any other person, exercise for his own benefit: and the creditor is to have the same remedies as if the debtor had power to charge the hereditaments, and had agreed to do so in writing, to the extent of the judgment debt and interest; (and see 23 & 24 Vict. c. 38, and 27 & 28 Vict. c. 112).

Beneficial powers of lunatics.

The Lunacy Act, 1890, s. 120, enacts that "the judge may by order authorize and direct the committee of the estate of a lunatic to do all or any of the following things:—(h) execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends; (l) exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit, or the power of consent is in the nature of a beneficial interest in the lunatic."

Sect. 128 enacts, "Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs."

Sect. 129 enacts, "Where under this Act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have

been made in the same case under the Trustee Act, 1850, or any Act amending the same, on the appointment thereunder of a new trustee or new trustees."

In *Re Nevill* (54 L. T. 290), a marriage settlement which gave a life interest to the husband, subject to an allowance for pin-money to the wife, gave to the trustees a power of advancement to the children with the consent of the parents. The husband became a lunatic; and the Court held that there was jurisdiction, under sect. 137 of the Lunacy Act, 1853, to authorize the committee to consent to an exercise of the power of advancement. But the Court cannot release a power on behalf of a lunatic (*Re Hirst*, W. N. (1892) 177).

6. The survivorship of powers may be conveniently considered in connection with the delegation of powers.

Distinction between powers and trusts.

In considering questions of delegation and survivorship of powers, the distinction between powers and trusts must be borne in mind. "Powers are never imperative; they leave the act to be done at the will of the party to whom they are given. Trusts are always imperative, and are obligatory upon the conscience of the party interested" (Wilmot, 23). Apart from statute, a naked power to two will not survive without express words or necessary implication: the reason being, that where the testator has disposed of his property in one direction, subject to a power in two or more persons enabling them to divert it in another direction, the property will go as the testator has first directed, unless the person to whom he has given the power of controlling the disposition exercise that power: *i. e.*, the previous estate is not to be defeated unless the power be exercised *modo et formâ*. But if a testator gives his property, not to one party subject to a power in others, but to trustees upon special trusts, with a direction to carry his purposes into effect, it is the duty of the trustees to execute the trust: thus, if the direction be to raise a sum of money, the estate is thereby at once charged, and it becomes the duty of the trustees to raise the charge so created. If an estate be devised to A. and B. in trust to sell, and thereby raise such a sum, it is a novel argument that after A.'s death B. cannot sell the estate and execute the trust (*Lane* v. *Debenham*, 11 Ha. 192;

Re Morton and Hallett, 15 Ch. D. 143; *Biggs* v. *Peacock*, 22 Ch. D. 284; *Re Cunningham and Frayling*, (1891) 2 Ch. 567; and as to trusts, see Lewin, 677 *et seq.*; *Cooke* v. *Crawford*, 13 Sim. 91; *Mortimer* v. *Ireland*, 11 Jur. 721; 6 Ha. 196; *Hall* v. *May*, 3 K. & J. 585; *Titley* v. *Wolstenholme*, 7 B. 425; Dart, V. & P. 6th ed. 682).

Mere powers as distinguished from trusts are strictly construed, and can only be exercised by the persons who are, either expressly or by reference, designated as donees of the power.

Power to A. and B. and their heirs.

Thus a bare power to A. and B. *and their heirs* is exerciseable after the death of A. by B. and the heir of A. "It is to be considered as a tenancy in common. It is equivalent to saying, with consent of both while they live, but when one dies, that consent shall devolve upon his heir: the heir of the dead trustee shall consent as well as the surviving trustee. One may abuse the power. I will supply the loss of one by his heir: and the loss of both by the heirs of both" (*Mansell* v. *Mansell*, Wilm. 51).

Not exercisable by the survivor alone.

Such a power cannot be exercised after the death of A. without the concurrence of his heir. In *Townsend* v. *Wilson* (1 B. & Ald. 608), a power of sale was given to three trustees and their heirs; the trustees were mere trustees to preserve, and had no estate in the land; the purchase-money was directed to be paid to the trustees or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor; and there was a power of appointment of new trustees. One trustee died: it was held that the survivors alone could not sell.

In *Hall* v. *Dewes* (Jac. 189), Lord Eldon said that he did not agree with the decision in *Townsend* v. *Wilson*, but he followed it so far as to refuse to enforce specific performance against a purchaser in the case before him. The power there was contained in marriage articles: a settlement was afterwards made in pursuance of, but not in accordance with, the terms of such articles. The power of sale was with the consent of three trustees, their heirs, or assigns: receipts were to be given by the three trustees, or the survivor, his executors, or administrators, and there was a power of appointing new trustees. One trustee went abroad, and a new trustee was appointed in his place;

another died; the survivor and the new trustee, without appointing another new trustee, and without the concurrence of the heir of the deceased trustee, attempted to sell. The Court refused to force the purchaser to take the title.

Power to A. and his assigns.

A discretionary legal power limited to A. *and his assigns* is exerciseable by the grantee, devisee, heir, or executor, as the case may be, of A. (*How* v. *Whitfield*, 1 Vent. 338; Sug. Pow. 180).

In *Saloway* v. *Strawbridge* (1 K. & J. 371; 7 D. M. & G. 594), a mortgage deed gave a power of sale to the mortgagee, his heirs, executors, administrators, and assigns, with a direction that the receipt of the same persons should be a good discharge. It was held that the administrator of the transferee of the mortgage, with the concurrence of a trustee to whom the heir of the mortgagee had conveyed the legal estate, could validly exercise the power.

To A., his executors or administrators.

A power of sale, given to A., his executors or administrators, can be well executed by an administrator *durante minore ætate* (*Monsell* v. *Armstrong*, 14 Eq. 423). The limit to such an administration is the minority of the person, but there is no other limit: he is an ordinary administrator appointed for the purpose of getting in and realizing the estate, and paying the debts (*Cope* v. *Cope*, 16 Ch. D. 49). But where a testator gave his executors a discretionary power to carry on his business, and they renounced, it was held that the administrator with the will annexed could not exercise the power (*Lambert* v. *Rendle*, 3 N. R. 247).

Power given to persons named.

7. Apart from the provisions of the Conveyancing Acts, 1881 and 1882, the rules as to the survivorship of powers are not perhaps quite settled, but the following appear to be the results of the authorities:—

A bare power, given to two or more by name, cannot be executed by the survivor.

This is not because there is anything in a power incompatible with its surviving, but if a man says he will trust two, the law will not say he shall trust one; it is a joint confidence. It will

be otherwise if the power be limited to the survivor; that is saying that he will trust two as long as they live, and afterwards one of them (*Mansell* v. *Mansell*, Wilm. 43).

Where a naked power is vested in two or more *nominatim*, without any reference to an office in its nature liable to survivorship, as an executorship is, it without doubt would be a contradiction of the general rule to allow the power to survive (Harg. note, Co. Litt. 113 a.).

In *Montefiore* v. *Browne* (7 H. L. C. 241), it was held that a power of revocation to be exercised by A. and B. could not be exercised by the survivor of them. It will be the same if the power be merely to consent. In *Atwaters* v. *Birt* (Cro. Eliz. 856), there was a feoffment to uses, with a proviso that, on payment of 12*d.* and procuring the assent of the feoffees (reciting their names), the uses should cease. One of the feoffees died, and it was held that the power of assenting was not exerciseable by the survivors.

Protectors of settlements.

But the rule does not apply to the case of protectors of settlements under 3 & 4 Wm. 4, c. 74, s. 32. In *Bell* v. *Holtby* (15 Eq. 178), two persons were appointed protectors, and one died; no provision was made for filling up a vacancy in the office. It was held that the surviving protector with the tenant in tail could effectually bar the entail. But the protectorship does not necessarily pass with the office of trustee. In *Clarke* v. *Chamberlin* (16 Ch. D. 176), it was held that when the trustees who were appointed protectors had all died, the tenant for life, and not the new trustees, became protector.

Mr. Vaizey (Settlements, 348) says that this rule appears to have been abrogated, as regards powers contained in instruments coming into operation after 31st December, 1881, by the Conveyancing Act (cited *post*, s. 11). But Messrs. Hood & Challis say the contrary (p. 104, 3rd ed.). If the power is given to persons who are in fact trustees, although it be given to them under their names, the section would appear to apply: the survivorship of the power should depend not on the name by which the donees are called, but on the fact of their being trustees or not.

Power to several as a class.

8. If the power be given to several, not *nominatim*, but as a class (*e. g.*, to "my sons"), it seems doubtful whether, after the death of one of the number, the survivors can sell. Lord St. Leonards states the rule to be, and it is perhaps the better opinion that it is, this—

> Where the power is given to three or more generally, as to "my trustees," "my sons," &c., and not by their proper names, the authority will survive whilst the plural number remains (Sug. Pow. 128, *sed qu.*).

In *Vincent* v. *Lee* (Co. Litt. 113 a; Cro. Eliz. 26), a testator devised his lands to A. in tail, and if A. died without issue, that his lands should be sold by his sons-in-law. He had five sons-in-law at his death. One of them died; then A. died, leaving issue a daughter, who died without issue; and then the four sons-in-law sold. This was held good. This case is hardly an authority for the rule to the extent above stated. The power of sale did not arise until the failure of A.'s issue, and it was not adjudged that, if one of the sons-in-law had died after such failure, a sale by the survivors would have been good. The reason of the decision was probably the same as in the case mentioned by Coke immediately before (113 a), viz., that the *land could not have been sold before—i. e.*, the power did not arise before, and the plural number remained. And considerable doubt is thrown on the correctness of the rule by the case of *Sykes* v. *Sheard* (2 D. J. & S. 6). In that case a testator devised his real estate to trustees on trust to sell, and hold the proceeds on trusts for his children and their issue, subject to a proviso that no sale should be made without the consent of his sons and daughters. The testator left seven children, one of whom, a daughter, afterwards died, and her husband became absolutely entitled to her share. The trustees, with the consent of the surviving children and of the husband of the deceased daughter, put up the estate for sale. The Lords Justices held that, notwithstanding the case of *Vincent* v. *Lee*, the title was much too

Decision contrary to the rule above stated.

doubtful to be forced upon a purchaser. On the other hand, V.-C. Malins, in *Jefferys* v. *Marshall* (19 W. R. 95), entirely dissented from the decision in *Sykes* v. *Sheard*. Mr. Vaizey (p. 348) considers this rule also abrogated; but it may be doubted whether the sons in *Sykes* v. *Sheard* were trustees within the meaning of the section.

9. The next rule is also doubtful; but it seems the better opinion that—

Powers annexed to an office.

> Where a power is annexed to an office (*e. g.*, if it be given to executors), all persons who fill the office can exercise the power; but if the power be given to persons named officially (*e. g.*, to my executors A. and B.), it is in each case a question of intention whether the power is given to the person or annexed to the office—*sed qu.*

In *Brassey* v. *Chalmers* (16 B. 233), the Master of the Rolls says that it is settled by repeated authorities that when a naked power is given to several persons it cannot be executed by the survivors. It is a power the execution of which is entrusted to several individual persons jointly, which can only be executed by them all, and if one of them should die, the authority will not survive. It is also equally settled, that if the power be annexed to the office, any persons who fill the office of executor will have also the power which is attached to that office. The chief difficulty arises in cases where the power is given to certain persons by name, and they are also appointed executors; and in these cases the proper distinction seems to be, and it is incumbent on the Court to ascertain in such cases, whether the power is given to the executor or to the person.

Mr. Hargrave (Co. Litt. 113 a) conjectures that where a power of selling is given to executors, or to persons *nominatim* in that character, a surviving executor may sell: for by the death of one executor the whole character of executor becomes vested in the survivor, and the power being annexed to the

executors *ratione officii*, and the office itself surviving, the power annexed to it should also survive; and he cites an opinion of C. J. Hale in favour of his view, and Kelw. 44; 2 Brownl. 194, where it is said that such a power given to executors passes to their executors and administrators. It is, however, doubtful if this latter statement is correct (see *ante*, p. 93). An executor who renounces cannot exercise the power (*Attorney-General* v. *Fletcher*, 5 L. J. Ch. 75).

In Jenk. Cent. p. 43, ca. 83, it is said that, at Common Law, if a man devise that A. and B. shall sell his land and makes them executors, one cannot sell without the other, although the latter die. But it is otherwise if he devise that his executors sell, and afterwards names A. and B. to be his executors at the end of his will; for the naming them by their proper names in the first instance shows personal confidence in A. and B. as private persons. And it seems, too, that if the devise be that A. and B., his executors, shall sell his lands, and they be named executors at the end of the will, the survivor can sell; for the power (the word in the original is "interest," but this must be a mistake, as it is clearly a power) is annexed to the office by this repetition.

In *Howell* v. *Barnes* (Cro. Car. 382), a man devised his lands to A. for life, and afterwards ordered the same to be sold by his executors thereunder named, and the moneys thereof coming to be divided among his nephews, and he appointed B. and C. executors. The two questions for the Court were, whether the said B. and C. had an interest or a power? and whether B. could sell after the death of C.? And it was resolved that B. and C. had a power, and that the surviving executor might sell.

In *Crawford* v. *Forshaw* (1891, 2 Ch. 261), a legacy was given to A. on attaining sixteen; if she died under that age, "the amount to remain at the disposal of my executors for distribution to such charities as they approve of"; and after other legacies the testator appointed X., Y., and Z. executors, and gave his residue to certain charities, "or such others or additional as my executors *herein named* may select to be divided in such proportions as they may approve of." X. renounced.

Y. and Z. proved. It was held that Y. and Z. could exercise the power.

In *Brassey* v. *Chalmers* (4 D. M. & G. 528; 16 B. 223), a testator gave power to sell lands to his executors therein mentioned, with the approbation of his trustees for the time being, and he appointed A. and B. executors. The Master of the Rolls thought that the power was given to A. and B. individually, and not to them in their character of executors. The Lords Justices, however, did not concur in this view, but followed *Howell* v. *Barnes;* (and see Sug. Pow. 128; *Re Cookes*, 4 Ch. D. 454; *Eaton* v. *Smith*, 2 B. 236).

In *Byam* v. *Byam* (19 B. 58), a tenant for life was authorized to withdraw a fund from settlement with the consent of the "undersigned trustees." The Master of the Rolls thought that the power was annexed to the office, and not given to the persons named as trustees in their individual character, and accordingly might be exercised by the trustees for the time being, whoever they might be; (and see *Bartley* v. *Bartley*, 3 Drew. 384).

In *Delany* v. *Delany* (15 L. R. Ir. 55), a legacy was given to the testator's son, if he should conduct himself to the satisfaction of the testator's executors. It was held that the power was given to the executors *virtute officii*, and that those who proved could approve or disapprove, although the others had not renounced; (and see *Devitt* v. *Kearney*, 13 L. R. Ir. 45; *Ex parte Butcher*, *Re Mellor*, 13 Ch. D. 465).

In *White* v. *Macdermott* (7 I. R. C. L. 1), there was a devise by will to A. for life, with remainder to his children, and a declaration by a codicil that the devised premises should not descend to any child or children of A., except to such as he might have by such woman as he should marry with the sanction and approval of the testator's trustees and executors. One trustee had never acted; and it was held that his consent was not necessary.

Cases contrary to the last rule.

On the other hand, in a note to *Danne* v. *Annas* (Dyer, 219 a), a case is stated, wherein A. devised that his executors should sell his lands: one died, and the others could not sell, by the opinion of Anderson, Windham, and Rhodes. This is, probably, the

same case as *Lock* v. *Loggin* (1 And. 145), where a testator devised lands to A. for life, with remainders over in tail; and for default of issue to be sold by the executors. The testator died; then one of the executors died; then the tenant in tail in remainder died without issue, and then A. died. It was held that the surviving executors could not sell. So in *Anon.* (Dyer, 177 a), a testator devised that A., B., and C., his feoffees, should sell his land after his wife's death. The testator died; then A. died; and then the testator's wife died. It was held that B. and C. could not sell: "but, *quære*, if they had not been named A., B., and C., but feoffees only;" (and see Co. Litt. 112 b; Chance on Powers, 662 *et seq.*).

In *Cole* v. *Wade* (16 Ves. 27), it was held that where a power is of a kind that indicates a personal confidence, it must *primâ facie* be understood to be confined to the individual to whom it is given, and will not, except by express words, pass to others, to whom by legal transmission the same character may happen to belong. But in that case the power was of a very special nature (viz., of selecting which relations of the testator should share in his estate), and was given to the executors on the express ground of personal confidence. This rule really depends on the construction of the instrument. If on such construction the power is given to individuals who are not executors or trustees, the 38th section of the Conveyancing Act, 1881, will not assist. If it is given to trustees or executors, the section applies. It will be observed, however, that the Conveyancing Act as to disclaimer is not confined to trustees and executors (see *post*, p. 462).

Powers do not pass to heir when trustees disclaim.

And where lands are devised to trustees in fee, with powers which in their execution require the exercise of judgment and discretion, and the trustees disclaim the devise, so that the legal estate descends on the heir-at-law, he cannot exercise the power, although he holds on the trusts of the will. Such trusts and powers are supposed to have been committed by the testator to the trustees he appoints by reason of his personal confidence in their discretion, and it would be wrong to permit them to be exercised by the heir-at-law, who may be a person unknown to

the testator, or in whom he has no confidence at all. A trust which gives the trustee no other duty to discharge than simply to clothe the equitable ownership with the legal estate may, indeed, be performed by the heir. It does not follow that a trust may be performed or a trust power exercised by the heir-at-law, because it is obligatory on the trustees of the will. It depends on the question whether in the exercise anything has to be supplied by the judgment, knowledge, and discretion of the person acting in the exercise of such trust or power (*per* Lord Westbury, *Robson* v. *Flight*, 4 D. J. & S. 613).

10. If the power arises by implication, it attaches to the office, and may be exercised by the holder of the office for the time being.

Power which arises by implication survives.

In *Anon.* (2 Leon. 220), A. devised his lands to his wife for life, and if he should have no issue by her, then he willed that his lands should be sold after the death of his wife and the money distributed to three of his blood. He made his wife and B. executors, and died. B. died and the wife sold. The sale was held good; although no persons were named, the executors were the persons to sell, and the power survived.

This decision seems untenable, however, on the grounds that the power did not arise until the death of the wife (*ante*, p. 147), and that the executors could not, under the circumstances, have been intended to sell (*ante*, p. 70).

In *Anon.* (Dyer, 371, b. 3), a man devised all his lands to A., except his manor of R., which he appointed to pay his debts: and he made two executors and died, and one executor died. It was held that the survivor could sell; (and see *Milward* v. *Moore*, Savile, 72; *Forbes* v. *Peacock*, 11 M. & W. 630; *Sabin* v. *Heape*, 27 B. 553).

11. By the Conveyancing Act, 1881, s. 38, it is enacted,

Conv. Act, 1881, s. 38.

"(1.) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust,

the same may be exercised or performed by the survivor or survivors of them for the time being.

"(2.) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this Act."

It will be observed that the section extends only to executors and trustees.

Conv. Act, 1882, s. 6.

By the Conveyancing Act, 1882, s. 6, it is enacted,

"(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

"(2.) On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

"(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act."

This section is expressed in general terms, and although the marginal note to the section is "disclaimer of power by trustees," this cannot affect the generality of the words of the section (see *Att.-Gen.* v. *G. E. Rail. Co.*, 11 Ch. D. 449, 461, 465; *Claydon* v. *Green*, L. R. 3 C. P. 511; *Sutton* v. *Sutton*, 22 Ch. D. 511).

Under this section a renunciation of probate has been held to be equivalent to disclaimer (*Re Fisher and Haslett*, 13 L. R. Ir. 546; and see 21 Hen. 8, c. 4 (*ante*, p. 89), an Act which, being subsequent to Poyning's Act, did not extend to Ireland; *Devitt* v. *Kearney*, 13 L. R. Ir. 45; *Thompson* v. *Todd*, 15 Ir. Ch. R. 337).

CHAPTER XII.

POWERS IN THE NATURE OF TRUSTS.

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Powers intermediate between trusts and powers.

1. "WHERE there is a mere power of disposing and it is not executed, the Court cannot execute it; but wherever a trust is created and the execution of that trust fails by the death of the trustee or by accident, the Court will execute the trust. But there are not only a mere trust and a mere power, but there is also known to the Court a power which the party to whom it is given is intrusted and required to execute; and with regard to that species of power, the Court considers it as partaking so much of the nature and qualities of a trust, that if the person who has that duty imposed on him does not discharge it, the Court will to a certain extent discharge the duty in his room and place. The principle is that if the power is one which it is the duty of the donee to execute, made his duty by the requisition of the will, put upon him as such by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and

has not a discretion whether he will exercise it or not. The Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it" (*Brown* v. *Higgs*, 8 Ves. 561; *Richardson* v. *Chapman*, 7 Bro. P. C. 318; *Pierson* v. *Garnet*, 2 Bro. C. C. 38, 226; *Maddison* v. *Andrew*, 1 Ves. sen. 58; *Birch* v. *Wade*, 3 V. & B. 198; *Harding* v. *Glyn*, 1 Atk. 469; 2 W. & T. L. C.).

"Where there is a power of selection among certain objects, and an intention manifested that the objects should not be disappointed,—for instance, where there is a bequest to the testator's wife for life, and after her decease to be divided or distributed amongst such of his children as she should appoint,—as the right to exclude some does not prevent the class from taking in default of appointment, it would now be held, notwithstanding the decision in *Duke of Marlborough* v. *Lord Godolphin*, that the children take in default of appointment, either by implication or because the power is coupled with a trust" (*Salusbury* v. *Denton*, 3 K. & J. 535). It is very doubtful whether *Crossling* v. *Crossling* (2 Cox, 396) was rightly decided (see Sug. Pow. 592).

In all these cases, although in terms no obligation was imposed on the donee to exercise the power, and although in some he had a discretion to select from the class the individuals to take, yet as the property was given to him generally with such a power, and his own interest was confined to his life by plain construction, an intention was collected that the interest beyond his own life was to vest in the objects, and that he, having a sufficient estate for that purpose, and a power, was bound to give effect to that intention; and his neglect to exercise his discretion, or to execute his power amongst the objects—where none was to be excluded—was not permitted to operate to the detriment of his *cestui que trust*: for such the objects of a power in the nature of a trust really are, although the person to whom the power is given has more than the authority of a common trustee (Sug. Pow. 590).

There are two classes of cases which fall under this head—

(1) Where the testator has given an absolute interest to A. and superadded a power in favour of third persons which (on the construction of the particular words used) amounts to a trust; in other words, where the testator has imposed a duty on the donee of the power, and has also given him an interest extensive enough to enable him to discharge it. (2) Where the testator has given the donee of the power no estate or interest out of which the power can take effect. "There is, however, a distinct class of cases where the donee of the power takes not more than a life estate. In these, however clear the expression of desire on the part of the donor in favour of a particular person or class of persons may be, yet as the donee has no estate, or none beyond his life, the trust to exercise the power is, as such, personal, and does not directly attach upon the inheritance, save in so far as the Court finds in the language an implication in favour of the objects of the power in default of appointment. In this case, if they take the estate, they take it by implication, and thus by way of limitation under the instrument creating the power. In the former class of cases (*i. e.*, (1) above), the Court acts by executing the power in lieu of the donee; in the latter, by simply giving effect to the estate implied in the words of the deed or will" (*per* Porter, M. R., *Moore* v. *Effolliot*, 19 L. R. Ir. 499, 502).

It may be doubted whether there is any practical distinction between the two classes of cases (Sug. Pow. 591; *Wilson* v. *Duguid*, 24 Ch. D. 244; *Pocock* v. *Attorney-General*, 3 Ch. D. at p. 347). If the power is testamentary only, and the claim is made under the alleged trust, the claimant must show that the power might have been exercised in his favour; but if this were the true construction of the power, it would probably be found that the same words, if relied on as implying a gift, would limit the objects of the gift to the persons who survived the donee of the power. Thus, *Halfhead* v. *Shepherd* (28 L. J. Q. B. 248), is cited by Lord St. Leonards (Pow. 593) as an authority for the proposition that there can be no implied gift from the power, when that power never arises. But it might equally well be put on the ground that there was no class of

persons to whom to appoint, and therefore none to whom to imply a gift.

And there is a third class of cases, where the property is actually given to the objects, but the shares or interests are to be apportioned by a third person. In these cases the objects take, although the power be not exercised, by force of the original gift (Sug. Pow. 597). And see as to duty, *Attorney-General* v. *Heywood* (19 Q. B. D. 326).

The rule may be thus stated:—

Gift implied from the power.

> If there is a power to appoint among certain objects, but no gift to those objects, and no gift over in default of appointment, the Court implies a trust for or a gift to those objects equally, if the power be not exercised.

The rule is the same whether there is a gift over in default of objects of the power or not.

"When there appears a general intention in favour of a class, and a particular intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class. When such an intention appears, the case arises, as stated by Lord Eldon in *Brown* v. *Higgs* (8 Ves. 504), of the power being so given as to make it the duty of the donee to execute it: and in such case the Court will not permit the objects of the power to suffer by the negligence or conduct of the donee, but fastens upon the property a trust for their benefit" (*Burrough* v. *Philcox*, 5 M. & C. 92; and see *Re Hargrove*, 8 I. R. Eq. 256; *Carthew* v. *Enraght*, 20 W. R. 743). In *Re Caplin* (2 Dr. & Sm. 527), a testator gave part of his residuary estate to his wife for life, and after her death to be paid to such and so many of the relations or friends of the wife as she should by will appoint. There was no gift in default of appointment; and it was held that there was an implied trust in favour of the objects of the power, who were held to be next of kin, "friends" being read

as synonymous with "relations." In *Sinnott* v. *Walsh* (5 L. R. Ir. 27), a testator in 1837 gave freeholds to his two sons, and proceeded, "should either of my said sons die without issue, his part of the property to fall to whatever existing member of my family he may be disposed to will it to." It was held that "existing" meant living at the date of the will, and that there was an implied gift in default of appointment to all the objects of the power in equal shares. In *Re White* (John. 656), there was a bequest to trustees for A. for life, and if he should die childless, upon trust to apply the trust fund for the benefit of such of the testator's children or their issue as the trustees should think fit: there was no gift in default of appointment. No appointment was made, and A. survived the trustees and died childless. It was held that the children and remoter issue of the testator took in equal shares *per capita*.

In *Walsh* v. *Wallinger* (2 R. & M. 78), a testator bequeathed the residue of his estate to his wife for her own use and benefit, trusting that she would at his decease give and bequeath the same to their children in such manner as she should appoint. There was no gift in express terms to the children, nor any intention displayed that they were to take in default of appointment. It could only be inferred from the power itself who were to take in default of appointment, and it was held that the children who survived the wife took.

In cases falling within the first of the classes mentioned above, the trust imposed must be, on its true construction, imperative if it is to override or control the prior absolute gift. A power which is merely permissive is not enough (*Brook* v. *Brook*, 3 Sm. & G. 280).

2. There are cases also which are distinct from those above mentioned, in which the objects of the power are held to be objects not of a trust but of an implied gift from the words of the power or of the gift over; the distinction is not important, as the result is the same in both cases.

Gift implied from the gift over being in default of objects of the power.

It is, perhaps, more easy to imply a gift when there is a power of appointment among a class, but no gift to that class, and a gift over in default of objects of the power (not of appointment),

than in cases where there is no such gift over. The insertion of the gift over must almost necessarily imply a preceding gift to the class in default of which it is to take effect, or be unmeaning; and the gift by implication is of as large an estate as might have been appointed under the power (*per* Channell, B., in *Roddy* v. *Fitzgerald*, 6 H. L. C. at p. 839, citing *Crozier* v. *Crozier*, 3 Dr. & War. 373).

In *Witts* v. *Boddington* (cited 5 Ves. 503), there was a gift to the testator's wife for life, with a power of appointment among the children of their daughter; but if no children of the daughter should be alive at his wife's decease, he gave the property to other persons. There was held to be an implied gift to the objects of the power.

In *Butler* v. *Gray* (5 Ch. 26), a testator gave his residuary estate to be equally divided among his children; he afterwards gave the dividends for the use of each of his children for their respective lives, and if they had children, then the principal to be at the disposal of the parent to such children, and in default of children, over. This was held to give the testator's children their respective shares for their lives, with power to appoint to their respective children, and part of such fund having been left unappointed by one of the testator's daughters, it was held to be divisible among her children equally. Lord Hatherley said that the daughter's interest was intended to be only a life interest with a power to appoint among her children, and in default of her having children (not in default of appointment), a gift over to the other members of her family. In that view of the case, therefore, if the power was not exercised, the children would be held to be direct objects of the original testator's bounty, and in default of appointment to take whatever had not been well appointed; (and see *Acheson* v. *Fair*, 3 Dr. & War. 512, where a life interest in the donee of the power was also implied; *Fenwick* v. *Greenwell*, 10 B. 412; *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708; *Wilson* v. *Duguid*, 24 Ch. D. 244).

Application of rule to gifts to charity.

The same rule applies in favour of charities. In *Pocock* v. *Att.-Gen.* (3 Ch. D. 342), the testator directed certain funds "to be given by my executors to such charitable institutions as I

shall by any future codicil give the same, and in default of any such gift then to be distributed by my executors in their discretion." It was held that this was a gift to charitable institutions to be nominated in the first instance by himself, and failing that by his executors, but to charity in any event; and it was pointed out that a gift to such charitable institutions as the testator should by codicil appoint is, without more, a clear gift to charity, though no codicil is made (*Mills* v. *Farmer*, 1 Mer. 55; *Moggridge* v. *Thackwell*, 7 Ves. 36; and see *Salusbury* v. *Denton*, 3 K. & J. 529).

Contrary intention in will.

The implication of gift must, of course, yield to an expression of a contrary intention in the will. Thus, if the power is not simply to pay over to the children of A., or the children of B., but is, at the uncontrolled discretion of the trustees, to apply the whole or such part as they may think fit of capital or income or both for the personal maintenance or otherwise for the benefit of A., or (at the option of the trustees) in augmentation of the shares of other legatees, the Court can draw no inference as to the persons to whom, or the shares in which, the testator meant the property to go in default of exercise of the power (*Re Eddowes*, 1 Dr. & Sm. 395). So, the testator may expressly negative the existence of any gift. Thus, in *Carberry* v. *McCarthy* (7 L. R. Ir. 328), a testator recited that he had already provided for his children (except one to whom he gave a large legacy), "and do not hereby make any further provision for them;" he then gave his residuary estate to his wife for life, with power to dispose thereof by deed or will to all or any of his children by her. It was held that there was no implied gift to the children.

In *Wheeler* v. *Warner* (1 S. & S. 304), a sum of 10,000*l.* stock was bequeathed to trustees on trust to pay the dividends to the testator's daughter while single; and, provided she married with the trustees' consent, the testator declared that his trustees should transfer to the husband such part, not exceeding one third, of the stock as they should think proper; and subject thereto trusts were declared of the corpus of the stock for the benefit of the daughter and her children. The daughter married in the

testator's lifetime without his consent, but he subsequently approved. It was held that the marriage with previous consent or subsequent approbation of the testator was equivalent to a marriage after his death with the consent of the trustees; and further, that the discretion given to the trustees was incident only to their authority to consent to the marriage, and that, in the circumstances that had happened, the will contained a gift of one-third of the 10,000*l.* stock to the husband. This was followed by V.-C. Malins in *Tweedale* v. *Tweedale* (7 Ch. D. 633).

Gift by implication, although the class to take is left to the donee's discretion.

3. And although the donee of the power has a discretion and may exclude one class entirely, the implication of a gift will still arise, if there appear to be an intention to give the property to the objects.

In *Longmore* v. *Broom* (7 Ves. 124), there was a bequest to executors in trust to pay among the testator's two brothers and his sister, *or* their children in such shares, &c., as the executors should think fit. The Master of the Rolls considered that the executors had a discretion, and might say to whom the fund should be given, the parents or the children: but that discretion not having been exercised, the fund was to be equally distributed between them; (and see *Re White*, John. 656, *ante*, pp. 466, 467).

And it would seem to make no difference that events have rendered it impossible to exercise the discretion. In *Carthew* v. *Enraght* (20 W. R. 743), a testator directed that after the death of his wife his trustees should pay and divide 1,000*l.* between such ten of the children of A. as his trustees should think fit. At the death of the widow there were only six objects of the power living. It was held that there was an implied gift to them, whatever their number might be.

But in *Jones* v. *Torin* (6 Sim. 255), where a testator bequeathed 6,000*l.* in trust for his daughter for life, and on her death "he gave the said 6,000*l.* to the children, *or* their descendants, of T. F. in such proportions as his said daughter should appoint," it was held that the descendants were mentioned merely as substitutes for the children. There was a direct gift with a power of selection.

In *Penny* v. *Turner* (2 Ph. 493), a testator, after giving his mother a life interest, willed and devised that all his property should be divided amongst his three sisters A., B., and C., *or* their children, in such proportions as his mother should appoint. No appointment was made, and there was held to be a gift in default to the whole class of daughters and children equally, not on the ground that "*or*" was to be construed "and," but that it was referable only to the power given to the mother of selection from among the class; (see, too, *Down* v. *Worrall*, 1 M. & K. 561 (a very doubtful case); *Little* v. *Neil*, 31 L. J. Ch. 627).

4. Where there is a gift over in default of appointment to the objects of the power or to other persons, the words of the power cannot operate to vest any estate in the objects of it by implication, if there be no appointment (*Jenkins* v. *Quinchant*, 5 Ves. 596, n.).

No gift implied if the gift over be in default of appointment.

In *Pattison* v. *Pattison* (19 B. 638), a testator gave a fund to his wife for life, with power for her to appoint it by will among A., B., and C., and their respective children, and in default of appointment, he directed that the same, at his wife's death, should go amongst all the said children equally. No appointment having been made, it was held that the children alone took, by virtue of the gift over, to the exclusion of A., B., and C.; (and see *Richardson* v. *Harrison*, 16 Q. B. D. 85; *Re Sprague*, *Miley* v. *Cape*, 43 L. T. 236; *Re Jefferys*, 14 Eq. 136, was wrongly decided on this point).

But a gift over, to take effect in an event which does not happen, has no operation, and therefore will not prevent the implied gift arising from the power itself (*Kennedy* v. *Kingston*, 2 J. & W. 431).

5. Where the property is itself given to the objects, but their shares or interests are to be declared by a third person, they take by force of the original gift to them, if the power be not executed. Questions have frequently arisen as to the period at

which such gifts vest; for it is well settled that the existence of a power of appointment does not prevent the vesting of the property until and in default of the execution of the power (*Doe* v. *Martin*, 4 T. R. 39); although the power be testamentary only (*Heron* v. *Stokes*, 2 Dr. & War. 89).

Period of vesting when there is a direct gift to a class.

If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and what manner the members of that class shall take, the property vests until the power is exercised in all the members of the class, and they will all take in default of appointment (*Lambert* v. *Thwaites*, 2 Eq. 151; *Bradley* v. *Cartwright*, L. R. 2 C. P. 511; *Wilson* v. *Duguid*, 24 Ch. D. 244).

In *Casterton* v. *Sutherland* (9 Ves. 445), there was a devise to the testator's wife for life, and after her death "unto and amongst all and every our children in such manner and in such proportion as my said wife shall, either in her lifetime or by her last will, appoint." There were five children, all of whom died before the wife, and there was no execution of the power. Sir W. Grant decided that it was a tenancy in common among all the children, subject to the power of appointment. The gift was direct to the children, and the power of appointment was exerciseable by deed as well as by will.

Power exerciseable by will only.

If there be a direct gift to the class, the mere fact that the power, the exercise of which may defeat that gift, is exerciseable by will only, is not enough to postpone the period of vesting, so as to make the direct gift available only for those of the class to whom the donee might have effectually appointed.

In *Brown* v. *Pocock* (6 Sim. 257), there was (in effect) a bequest to A. of 2*l.* per week for life, with a direction that a sum should be set apart to answer those weekly payments, and after the death of A. there was a power to A. to leave the sum to and for the benefit of his wife and children in such manner

as he should by will give and bequeath the same. There were four children of A. living at the death of the testatrix, of whom one died; and two other children were born afterwards. The wife died before the donee of the power. There was no valid appointment under the power, and the question was, to whom was the fund to go in default of appointment? It is to be observed that there was no direct gift to the wife and children, and only a power to A. to appoint by *will*. But it was held that the wife and children took in default of appointment as joint tenants, and therefore the surviving children were entitled to the fund. The decision was clearly founded on the circumstance that the power was to be exercised not merely for the benefit of an indefinite class of children, but also for the benefit of the wife, a living and defined individual, who was an object of the testatrix's bounty, and therefore it stood upon the same footing as if there had been a direct gift to the wife and children, in such manner as A. should by will appoint; and so it was a vested interest in the wife and children, subject to being divested by the execution of the power (2 Eq. 157).

If, however, the power is contingent on the donee leaving children, and there is a gift over in the event of there being no such child, no one can take by implication under a power to appoint by writing or by will, if no child survives the donee (*Winn* v. *Fenwick*, 11 B. 438; *Stolworthy* v. *Sancroft*, 33 L. J. Ch. 708). In *Faulkner* v. *Lord Wynford* (15 L. J. Ch. 8), a testator gave stock to trustees in trust for A. for life, and after her death to pay both principal and interest to her children as she should by deed or will appoint; but if she should leave no children living at her death, or all should die under twenty-five, then over. A. died without appointing, having had two children, one of whom died in her lifetime, aged twenty-eight, and the other survived her and died aged fifty-three. It was held by Wigram, V.-C., that the representatives of the two children took in equal moieties: the V.-C. saying that, as the power was to appoint by deed or will there was nothing to oblige the tenant for life to suspend her judgment as to the parties who should take till her death.

Vested interest can only be divested by appointment.

And where there is an interest vested in the objects entitled in default of appointment, such interest can only be divested by a valid execution of the power of appointment; and if there be no such execution, then all the objects who attained vested interests, whether alive or dead at the death of the donee of the power, will take (*Vanderzee* v. *Aclom*, 4 Ves. 771, 787).

Period of vesting, when there is no direct gift.

6. If the instrument does not contain a gift of the property to any class, but only a power to a third person to give it as he may think fit among the members of that class, those only can take under the implied gift in default of appointment who might have taken under an exercise of the power. In that case, the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might have given it (*Lambert* v. *Thwaites*, 2 Eq. 151).

In *Kennedy* v. *Kingston* (2 J. & W. 431), there was a bequest of 500*l.* to A. for life, and at her decease to divide it in portions, as she should choose, among her children. She had four children, one of whom died; and then when three were surviving, she made a will giving the fund in certain proportions to those three. Afterwards one of those three died before her. It was held that the appointment to the three was perfectly good, and that the lapsed share would go to the two who survived; and for this reason: there was no direct gift by the testator to the children; the fund was given to her for her life, with a power at her decease to divide it as she liked among her children. That she could only do by her will; and of course none but those who survived her could take under her will; and therefore those only who survived her must be presumed to have been intended by the original testator to take in default of appointment (2 Eq. 156; and see *Walsh* v. *Wallinger*, 2 R. &

M. 78; *Sinnott* v. *Walsh*, 5 L. R. Ir. 27; *Winn* v. *Fenwick*, 11 B. 438; *Re Susanni*, 26 W. R. 93).

Period for ascertaining the members of the class to take in default of appointment.

7. The period for ascertaining the class to take will, it seems, also vary, according as the testator has or has not given the donee of the power or some other person a life interest in the trust property.

If the donee has a life interest, the persons entitled in default of appointment are such of the objects of the power as are living at the death of the donee, not of the testator, whether the power be one of selection or of distribution merely (*Finch* v. *Hollingsworth*, 21 B. 112). But it seems that if there is a life estate given to a person other than the donee, the death of the longest liver of such life tenant and the donee of the power will be the period for ascertaining the class. In *Re White* (John. 656), there was a bequest to trustees for A. for life, and if he should die childless, on trust to apply the sum for the benefit of such of the testator's children or their issue as the trustees should think fit. A. survived the donees of the power. V.-C. Wood said: "The next question is, at what time the class is to be ascertained. The latest period which can be suggested is the death of the tenant for life. . . . In a case where the donee of the power survives the tenant for life, there would be a possible ground for arguing that the class must be kept in suspense long enough to let in all who might be born while the power was in existence. But here the latest period that can be fixed is the death of the tenant for life. Then the question arises, whether children who predeceased the tenant for life are entitled to share. The words of this will clearly point to a personal enjoyment by the objects of the power at the death of the tenant for life; there is therefore strong reason for holding, on the tenor of this particular will, if not on general principle, that none of those who predeceased the tenant for life could share in the benefits of an appointment under this power. There might be a question how far this, being an implied gift to all the objects of the power, ought to be considered as creating vested interests in them. This would apply forcibly to a case like *Penny* v. *Turner* (2 Ph. 493), where the objects are named; but

here the benefit is bestowed upon a class, and the question is at what time that class ought to be ascertained. I think that the right period is the death of the tenant for life; and the fund must therefore be divided among such of the children and grandchildren as were living at the death of the tenant for life in equal shares *per capita;*" (and see *Carthew* v. *Enraght*, 20 W. R. 743).

Where the distribution or selection is not suspended by any preceding life estate, it seems that the persons who answered the description and formed members of the class at the time when the instrument creating the power came into effect, will take (*Walter* v. *Maunde*, 19 Ves. 424, 426; *Cole* v. *Wade*, 16 Ves. 27). Lord St. Leonards, however, says (Pow. 662), that the point does not seem to have arisen in the latter case, as the same persons appear to have been the next of kin at the time of the testator's death and when the decree was pronounced, which was after the power had ceased. In *Longmore* v. *Broom* (7 Ves. 124), there was a bequest to executors on trust to pay unto and amongst the testator's two brothers and sister or their children as the executors should think fit; and it was held that the fund vested at the testator's death, and the power not having been exercised, after-born children could not take.

Extent of gift in default.

If the power is such as to allow the whole fee or interest to be appointed, the gift in default, whether it be express or implied, cannot be considered to be less than what might have been appointed by the exercise of the power (*Crozier* v. *Crozier*, 3 Dr. & War. 373).

8. In considering powers in the nature of trusts, the Court to some extent adopts its principles as to trusts, and if the donee fails to execute the power, will execute it for him (*Brown* v. *Higgs*, 8 Ves. 573). Whether it be considered that the objects of the power take by such execution by the Court, or by force of an implied gift, the effect is the same, and the same rules apply. Accordingly, as the implied gift is to the objects equally, so,

The objects take equally.

In general, the Court goes by the rule that

equality is equity, and gives the trust estate to the objects of the power equally (*Doyley* v. *Attorney-General*, 4 Vin. Abr. 485, pl. 16).

In *Salusbury* v. *Denton* (3 K. & J. 529), there was a bequest of a fund to be at the disposal of the testator's widow by her will, therewith to apply a part to the foundation of a charity school or such other charitable endowment for the benefit of the poor of O. as she might prefer, and under such restrictions as she might prescribe, and the remainder to be at her disposal among the testator's relatives as she might direct. V.-C. Wood said: "The case of *Doyley* v. *Attorney-General* was very similar to the present. There the property in question was bequeathed in trust for certain purposes, and, subject thereto, the trustees and the survivor of them and the heirs and executors of such survivor were to dispose of it to such of his relations on his mother's side who were most deserving, and in such manner as they thought fit, and for such charitable uses and purposes as they should also think most proper and convenient; and the Master of the Rolls directed that half of the estate should go to the testator's relatives on the mother's side and the other half to charitable uses, the known rule that equality is equity being, as he said, the best measure to go by. It appears to me that there is no possibility of distinguishing that case from the present; for there can be no substantial difference between a direction to dispose of property to such relations and for such charitable purposes as the trustees should think most proper, and a direction like the present to apply a *part* to such charitable purposes and the *remainder* among relatives with a like discretion;" (see, too, *Jones* v. *Jones*, 5 Ha. 440, as to payment of fines on renewal of leases).

The Court will adopt any rule laid down by the author of the power.

But if a rule has been laid down for the guidance of the donees of the power, the Court will act upon it in the same manner as the donees might have done (*Gower* v. *Mainwaring*, 2 Ves. sen. 87). "Where trustees have power to distribute generally, without any object pointed out or rule laid down, the Court interposes not (unless in case of a charity, which is different, the Court exercising a

discretion as having the general government and regulation of charity). But here is a rule laid down. The trustees are to judge of the necessity and occasions of the family; the Court can judge of such necessity of the family. That is a judgment to be made on facts existing, so that the Court can make the judgment as well as the trustees" (*Ibid.;* and see *Attorney-General* v. *Price*, 17 Ves. 371; *Mahon* v. *Savage*, 1 S. & L. 111; *Hewett* v. *Hewett*, 2 Ed. 332).

Requisites for the creation of a power in the nature of a trust.

9. It remains to consider what words will amount to an absolute unfettered gift; and what to a power in the nature of a trust for the benefit of others.

The Courts are not any longer anxious and astute to educe a binding trust from vague and ambiguous expressions; they endeavour to take words in their plain sense, do not express from them occult meanings unknown to the persons who employed them, and decline to manufacture dispositions for testators which they have not chosen to make for themselves (5 I. R. Eq. 375). The law as to the creation of precatory trusts is thus stated by Lord Langdale:—

> When property is given absolutely to any person, and the same person is by the giver, who has power to command, recommended, or entreated, or wished, to dispose of that property in favour of another, the recommendation, entreaty, or wish shall be held to create a trust. First, if the words are so used that, upon the whole, they ought to be construed as imperative; secondly, if the subject of the recommendation or wish be certain; and, thirdly, if the objects or persons intended to have the benefit of the recommendation or wish be also certain (*Knight* v. *Knight*, 3 B. 148; 11 Cl. & F. 513).

"If a testator gives 1,000*l.* to A. B., desiring, wishing, recommending, or hoping that A. B. will, at his death, give the same

sum or any certain part of it to C. D., it is considered that C. D. is an object of the testator's bounty, and A. B. is a trustee for him. No question arises upon the intention of the testator, upon the sum or subject intended to be given, or upon the person or object of the wish" (*Ibid.*).

There appears to be a fourth requisite—viz., the manner in which the trust is to be performed must be certain. This, perhaps, belongs partly to the uncertainty of the subject, and partly to the uncertainty of the object, and may be reduced to either the one or the other of them (*Reeves* v. *Baker*, 18 B. 379).

Intention of the testator.

10. It is often difficult to determine whether a testator who has first made an absolute gift, and then added words which would amount to a precatory trust, intends the donee to take absolutely or not.

Absolute gift followed by precatory words.

Lord St. Leonards (Prop. H. of L. 375) says that the law as to the operation of words of recommendation, confidence, request, or the like, attached to an absolute gift has in late times varied from the earlier authorities. In nearly every recent case the gift has been held to be uncontrolled by the request or recommendation made or confidence expressed. This undoubtedly simplifies the law, and it is not an unwholesome rule that if a testator really mean his recommendation to be imperative, he should express his intention in a mandatory form: but this conclusion was not arrived at without a struggle.

Trust not created.

It is in each case a question of the intention expressed in the will; but to ascertain this intention the proper course is to consider the whole will, and not to lay hold of particular words and say that, because such words have in other wills amounted to a precatory trust, therefore they must have the same meaning in all wills. This would be to apply to ordinary colloquial expressions the strictness of construction which has been imposed on words of art. "Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words; but considering all the words which are used we have to see what is their true effect, and what was the intention of the testator as expressed in the will" (*per* Cotton, L. J., in *Re Adams and Kensington Vestry*, 27 Ch. D.

at p. 410). There is, however, more difficulty in establishing a precatory trust, where the gift to the alleged trustee is coupled with words of limitation, or words such as "absolutely," "for his own use and benefit," and the like; although neither the presence nor the absence of such words is by itself conclusive, but the whole will must be considered. And it has been said that "absolute" may mean either unlimited in point of estate, or unfettered in respect of condition or trust (*Meredith* v. *Heneage*, 1 Sim. 542). But the present disposition of the Courts is certainly to refuse to cut down a clear absolute gift by reason of the addition of precatory words, and is rather to regard such words as mere expressions of the testator's wishes and belief as distinguished from a direction amounting to an obligation. It would not be a very strained inference to regard all such expressions as stating the motive that induced the absolute gift, rather than as a fetter imposed upon it. "In hearing case after case cited, I could not help feeling that the officious kindness of the Court of Chancery in interposing trusts, where in many cases the father of the family never meant to create trusts, must have been a very cruel kindness indeed" (*per* James, L. J., in *Lambe* v. *Eames*, 6 Ch. 597; and see *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Diggles*, 39 Ch. D. 253; *Re Downing*, 60 L. T. 140; *Mussoorie Bank* v. *Raynor*, 7 App. Ca. 321). In all these cases the Court refused to hold that a precatory trust was created. And the following are some of the cases to the same effect:—*Webb* v. *Woods*, 2 Sim. N. S. 267; *Thorp* v. *Owen*, 2 Ha. 607; *Winch* v. *Brutton*, 14 Sim. 379; *Mackett* v. *Mackett*, 14 Eq. 49; *Reid* v. *Atkinson*, 5 I. R. Eq. 162, 373; *Re Byrne*, 29 L. R. Ir. 250; *Re Adams and Kensington Vestry*, 27 Ch. D. 394.

Trust created.

On the other hand, in *Bernard* v. *Minshull* (John. 276), a testatrix gave her husband 13,000*l.* *absolutely*, but requested him, after reserving for his own absolute use and benefit 2,000*l.*, part of that sum, and applying all the interest to his own sole use and benefit during his life, to make such a disposition of the remainder as would effect her wishes often expressed to him. Under this gift, the husband could not take more than 2,000*l.*

for his own use: but it is to be observed that "absolutely" is contrasted with "his own absolute use and benefit;" (and see *Irvine* v. *Sullivan*, 8 Eq. 673).

In *Gully* v. *Cregoe* (24 B. 185), there was a gift of residue to the testator's wife for life, *for her own sole use and benefit for ever*, the testator feeling assured and having every confidence that she would dispose of the same equitably amongst her two daughters and their children. It was held that she took a life interest only, with a power of appointment. And a similar decision was arrived at in *Wace* v. *Mallard* (21 L. J. Ch. 355; 16 Jur. 492), where the gift was to the testator's wife, *her heirs, executors, administrators, and assigns, to and for her sole use and benefit*, in full confidence that she would in every respect appropriately apply the same for the benefit of their children. These cases were followed by V.-C. Hall in *Curnick* v. *Tucker* (17 Eq. 320), where a testator appointed his wife sole executrix, and gave her all his property *for her sole use and benefit*, in the full confidence that she would dispose of it among their children; (and see *Hart* v. *Tribe*, 18 B. 215; *Shovelton* v. *Shovelton*, 32 B. 143; *Palmer* v. *Simmonds*, 2 Drew. 221; *Green* v. *Marsden*, 1 Drew. 646; *Le Marchant* v. *Le Marchant*, 18 Eq. 414; *Fordham* v. *Speight*, 23 W. R. 782; *Corbet* v. *Corbet*, 7 I. R. Eq. 456).

What is sufficient evidence of intention.

11. If there be no words indicative of an intention to give an absolute beneficial ownership, it is less difficult to establish a precatory trust. Whenever a person gives property, and points out the object, the property, and the way in which it shall go, that does create a trust, unless he shows clearly that his desire is to be controlled by the party, and that he shall have an option to defeat it (*Malim* v. *Keighley*, 2 Ves. jun. 333).

The question always is, whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of the party, leaving it, however, to the party to exercise his own discretion (*Williams* v. *Williams*, 1 Sim. N. S. 358, 368).

Having regard to the principles laid down by the Court of Appeal, as before stated (*ante*, p. 479), it is submitted that no great reliance can be placed on the use of any particular words standing alone. A long list of cases will be found in Lewin on Trusts, 9th ed., 137, where such words as "desire," "will," "request," &c., have been held sufficient.

Uncertainty of subject.

12. One of the requisites stated in the rule in s. 8 was that the subject-matter must be certain. If, therefore, there be a gift by will, followed by apt precatory words, desiring that the donee will "leave the bulk" of the property given to persons named, no valid precatory trust will be created (*Palmer* v. *Simmonds*, 2 Drew. 221). So, a request that the legatee will give and bequeath "what should be remaining," or "what shall be left," to such members of her own and his family as the legatee should think proper, is too indefinite (*Green* v. *Marsden*, 1 Drew. 646). So, a gift to the testator's widow "feeling confident that she will act justly to our children in dividing the same when no longer required by her" (*Mussoorie Bank* v. *Raynor*, 7 Ap. Ca. 321; and see *Cole* v. *Hawes*, 4 Ch. D. 238; *Stead* v. *Mellor*, 5 Ch. D. 225; *Parnall* v. *Parnall*, 9 Ch. D. 96; *Creagh* v. *Murphy*, 7 I. R. Eq. 182; *Re Jenkins*, 23 L. R. Ir. 162; *Wynne* v. *Hawkins*, 1 Bro. C. C. 179; *Lechmere* v. *Lavie*, 2 M. & K. 197).

But if the terms of the will, taken as a whole, show that the request extends to all the property given by the will, a valid trust will be created (*Horwood* v. *West*, 1 S. & S. 387).

But a request that the donee of a life interest will leave "what money or property she might have saved from the yearly income thereinbefore given to her," is too indefinite to create a trust (*Courman* v. *Harrison*, 10 Ha. 234; and see *Sale* v. *Moore*, 1 Sim. 534; *Bardswell* v. *Bardswell*, 9 Sim. 319).

Trust, although the amount of interest is undefined.

It seems, however, that a valid precatory trust may in some instances be created, although the amount of interest to be given to the objects is left undefined. In *Crockett* v. *Crockett* (2 Ph. 553), there was a gift to A. to be disposed of for the benefit of herself and her children, and it was held that the children had some interest, but it was not declared what that interest was;

(and see *Woods* v. *Woods*, 1 M. & Cr. 401; *Godfrey* v. *Godfrey*, 11 W. R. 554; *Constable* v. *Bull*, 3 De G. & Sm. 411).

But in *Lambe* v. *Eames* (6 Ch. 597), where the words were similar to those in *Crockett* v. *Crockett*, the Lords Justices thought that there was no sufficient trust declared, but that if there was it had been fairly executed.

Trust for maintenance.

But a trust for the support and maintenance of an adult or infant is not too indefinite. "Whatever difficulties might originally have been supposed to exist in the way of a Court of Equity enforcing a trust, the extent of which was unascertained, the cases appear clearly to decide that a Court of Equity can measure the extent of interest which an adult, as well as an infant, takes under a trust for his support, maintenance, advancement, provision, or other like indefinite expression, applicable to a fund larger confessedly than the person entitled to the support, maintenance, or advancement can claim, and some interest in which is given to another person" (*Thorp* v. *Owen*, 2 Ha. 610, and cases there cited by V.-C. Wigram). And a gift of income to a father upon trust to apply all or so much as he should think fit thereof for the benefit, maintenance, and education of his son authorizes the father to apply the whole, whatever his financial position may be (*Malcomson* v. *Malcomson*, 17 L. R. Ir. 69). The person bound by such trust is regarded in the same light as the committee of a lunatic, or the guardian of an infant, *i.e.*, he has a duty imposed on him, but so long as he discharges that duty he is entitled to the surplus for his own benefit; and the Court requires from him no account retrospectively of the application of the fund, and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished, or will order payment to him on his undertaking to maintain the children properly, with liberty for the children to apply (Lewin, 9th ed., 145; and see *Re Evans*, 26 Ch. D. 58).

Uncertainty of objects.

13. Another of the requisites mentioned in the rule stated in s. 8, was that the objects must be certain. It will be seen how a power to appoint among the "family" of any person is

exerciseable (*post*, p. 505). But it seems that a gift to a man, "hoping that he will continue them in the family," is too indefinite in point of object (*Harland* v. *Trigg*, 1 Bro. C. C. 142; *Williams* v. *Williams*, 1 Sim. N. S. 358).

In *Lambe* v. *Eames* (6 Ch. 597), L. J. James seemed to think that a gift to be at the disposal of a person "for the benefit of herself and her family," was too indefinite for the Court to execute as a trust. He said that it was impossible to put any restriction on the meaning of the word, or to exclude any person who in ordinary parlance would be considered within the meaning; (but see *Wright* v. *Atkyns*, 19 Ves. 299; and as to the word "relations," see *Reeves* v. *Baker*, 18 B. 372; and *post*, p. 504).

When trust is raised, although the object is undefined.

But although vagueness in the object will furnish reasons for holding that no trust was intended, yet this may be countervailed by other considerations, which show that a trust was intended, while at the same time such trust is not sufficiently certain and definite to be valid and effectual. It is not necessary, in order to exclude the legatee from a beneficial interest, that there should be a valid or effectual trust: it is only necessary that it should clearly appear that a trust was intended (*Briggs* v. *Penny*, 3 Mac. & G. 546). In that case the testatrix, after giving a legacy of 3,000*l.* to A., and 3,000*l.* in addition for the trouble she would have in acting as executrix, gave the residue of her estate to A., "well knowing that she will make a good use of it and dispose of it in a manner in accordance with my views and wishes." It was held that a trust was created, and therefore that A. could not take beneficially. There is no real substantial difference between such a case and the case of a testator who gives all his property to A. on trust, but never declares that trust. In the latter case, there is the fact that a trust *nominatim* exists or was intended, but the objects are unknown; in the former, that views and wishes exist, and the bequest is made in confidence that they will be accomplished, but the objects are unknown. In both cases the legatee or devisee takes as a trustee for the next of kin or heir-at-law, unless the property can pass by a residuary gift (see

Bernard v. *Minshull*, John. 276; *Springett* v. *Jennings*, 6 Ch. 333).

In *Briggs* v. *Penny*, it is to be observed that, first, absolute legacies were given to A., and that then the residue was also given to her: the Court, therefore, more readily concluded she was a trustee. In *Irvine* v. *Sullivan* (8 Eq. 673), the testator devised his estate to three trustees on trust to sell, and directed them to hand over the net residue to D., and he gave and bequeathed the same to D. absolutely, "trusting that she will carry out my wishes with regard to the same, with which she is fully acquainted." V.-C. James held that D. took beneficially, subject to the performance of the wishes communicated to her by the testator and set out in the bill; (and see *Wood* v. *Cox*, 2 M. & Cr. 684; *Reid* v. *Atkinson*, 5 I. R. Eq. 373. And as to secret trusts, see *MacCormick* v. *Grogan*, L. R. 4 H. L. 82; *Norris* v. *Frazer*, 15 Eq. 318).

CHAPTER XIII.

OF THE OBJECTS OF PARTICULAR POWERS.

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The objects of limited powers.

1. In considering what persons are the objects of particular powers, it must be remembered that the donee of a limited power has no more dominion over the subject of the power than is given him by the terms of the power, and that the instrument creating the power is the only admissible evidence of the intention of the author of the power. The class cannot be made to contain objects other than those specified, because it is just or expedient, or because the author of the power would presumably have wished it, if the question had been laid before him; nor does the fact that the same person is both author and donee of the power make any difference.

If the power be one of distribution merely, the objects thereof are determined by the same rules of construction as apply to gifts in similar terms, but without any power annexed. But if the power authorizes selection, the donee may in some cases appoint to persons other than those who would be entitled under a simple gift to the same persons (see *post*, s. 7). It has not yet been determined whether Lord Selborne's Act (37 & 38 Vict. c. 37), by which all powers are, in the absence of expression to the contrary, made to authorize selection, has any effect on this question.

2. The words "child," "son," "issue," and all similar terms, mean *primâ facie* legitimate child, son, or issue (*Wilkinson* v. *Adam*, 1 V. & B. 422). "Child" and other similar words mean legitimate child, &c.

The same rule applies to "next of kin" (*Re Standley*, 5 Eq. 303).

No other meaning can be given to the words in a will by any conjectural application of other words found in the will and supposed to show the testator's intention: there must be clear evidence of that intention in the will itself to establish another application of the word. But there may be a gift to living illegitimate children as a class, if the words used by the testator show clearly that such children were intended to be the objects of his bounty: *primâ facie* the word "children" is to be read as if the word "legitimate" had been expressly inserted before it, but the testator may make his own dictionary, and may define children as including children who are illegitimate (*Hill* v. *Crook*, L. R. 6 H. L. 265; *Re Haseldine*, 31 Ch. D. 511, where the will and codicil were for this purpose read as one instrument, notwithstanding the doubt expressed in *Re Clark*, 14 Ch. D. 422).

In *Dorin* v. *Dorin* (L. R. 7 H. L. 568), a man who had two illegitimate children by a woman, married her, and the day after his marriage made a will in which, after a life interest to her, he said, "I leave her at liberty to direct the disposal of the property amongst our children by will at her death in such manner as she shall think fit, and should she make no will I desire that the property existing at her death shall be divided, as far as it may be practicable to do so, equally between my children by her." He had no child born after the will, but he lived for some time afterwards and always treated the two illegitimate children as his own children. It was held by the House of Lords, reversing Malins, V.-C., that these children could not take; (and see *Re Ayles*, 1 Ch. D. 282). But a gift to an illegitimate child *en ventre sa mère* at the date of the will, and born after the testator's death, is not contrary to public policy (*Crook* v. *Hill*, 3 Ch. D. 773). Such a child can take under a gift to children if it sufficiently appear that the children

intended are illegitimate children (*ibid.*; *Dover* v. *Alexander*, 2 Ha. 282). But an illegitimate child, neither *en ventre*, nor born until after the testator's death, cannot take. Such a gift is said to be the same as a deed on an immoral condition (3 Ch. D. 773).

An illegitimate child *en ventre* can be accurately described by reference to its mother (*Evans* v. *Massey*, 8 Pri. 22; *Gordon* v. *Gordon*, 1 Mer. 142); but cannot be described by reference to its father, as the fact of the paternity would involve an inquiry which the law will not allow (see *Earle* v. *Wilson*, 17 Ves. 528). The reputation of paternity is a proper subject of inquiry; the fact of paternity is not (*Re Bolton*, 31 Ch. D. 542).

It is, however, proper to consider the circumstances existing at the date of the will; and if there is no possibility of legitimate children existing or coming into existence to satisfy the terms of the gift, illegitimate children who have acquired the reputation of children may take (*Re Hastie*, 35 Ch. D. 728; *Re Horner*, 37 Ch. D. 695; Theobald on Wills, 215 *et seq.*).

Although in cases of intestacy the children must be legitimate according to the law of England (*Doe* v. *Vardill*, 7 Cl. & F. 895), it has been held that a devise to "children" includes a child legitimate according to its domicil, although not so according to the law of England (*Re Gray*, (1892) 3 Ch. 88). When the subject-matter is personal estate, it is sufficient if they are legitimate by the law of their domicil (*Re Goodman*, 17 Ch. D. 266). And such legitimation may take place by the subsequent marriage of their putative father and mother, if the law of the domicil allows it (*Re Andros*, 24 Ch. D. 637): provided that the father was domiciled in a country whose laws allowed such legitimation, both at the time of the marriage which gave the status of legitimacy, and at the time of the birth on which it took from its putative father the potentiality of being legitimated (*Re Grove*, 40 Ch. D. 216).

Date at which repute must have been acquired.

In order to enable illegitimate children to take by repute, they must have acquired the reputation of being the offspring of their parent before the instrument containing the power takes effect; for by the policy of the law, the paternity of illegitimate children cannot be inquired into: a gift by will by a testator or

testatrix to one of his or her children by a particular person is good, if the child has acquired the reputation of being such child as described in the will before the death of the testator or testatrix (*Re Goodwin*, 17 Eq. 345; *Eccleston* v. *Fullalove*, 9 Ch. 147). And in the same way, a power created by will to appoint among children may be exercised in favour of illegitimate children who have acquired the reputation of being children at the testator's death (*Metham* v. *Duke of Devonshire*, 1 P. W. 529). But there cannot be a valid gift to a future illegitimate child denoted only by reference to paternity: "a man cannot provide for the illegitimate children of himself or of another man by any reference that involves an inquiry as to their paternity. The law allows no criterion of paternity but marriage" (*Re Bolton*, 31 Ch. D. 542, 553).

A provision by deed for the future issue of an illicit intercourse is bad, for it can only take effect as a gift on condition that there shall be unlawful intercourse resulting in the birth of offspring. Accordingly, inasmuch as a deed takes effect from its execution, in order that children may take under a limitation to them as such, they must be legitimate, or they must at the date of the deed have acquired the reputation of being children (Co. Litt. 3 b). And it would appear that if a man settled property by deed on himself for life, with remainder to such of the children as he might at his death be reputed to have by A., as he should by will appoint, and in default to B., the power of appointment as to after-born children would be bad, even though the deed might contain a general power of revocation, and might have remained in the testator's custody without communication to any one till the time of his death (*per* Lord Selborne, 9 Ch. 156; and see *Blodwell* v. *Edwards*, Cro. Eliz. 509).

In *Thompson* v. *Thomas* (27 L. R. Ir. 457), A. (an unmarried woman) assigned by deed to B. (her reputed husband) and C. a policy on her life in trust for X. and Y., being the two children then living of A., and all and every her other children living at her death. A third child was born after the date of the deed, and the trust in her favour was held void as contrary to public policy.

A devise or bequest to the children of A., or of the testator, means *primâ facie* children in existence at the testator's death, provided that there are any such in existence (*Mann* v. *Thompson*, Kay, 638). A devise or bequest in remainder to children as a class vests in all the children in existence at the death of the testator, but so as to open and let in children subsequently coming into existence before the period of distribution (*Browne* v. *Hammond*, Johns. 212, n.). Both these rules extend to grandchildren, issue, brothers, nephews, cousins (*Lee* v. *Lee*, 1 Dr. & Sm. 85; *Baldwin* v. *Rogers*, 3 D. M. & G. 649).

By analogy to these rules:

"Children" means such as are living at testator's death.

A power created by will to appoint among the children of A. is *primâ facie* limited to the children in existence at the testator's death, if there are any such. A similar power, subject to a life interest in B., can be exercised only in favour of children existing in the lifetime of B. (*Paul* v. *Compton*, 8 Ves. 375; *Harvey* v. *Stracey*, 1 Dr. 73).

But it will be otherwise if there is clear evidence of intention that all children are to be included; the general rule always yields to the particular intention clearly expressed, and if there were no children of A. living at the death of the testator, all his children whenever born would be objects of the power; (cf. *Harris* v. *Lloyd*, T. & R. 310; and see Hawkins on Wills, pp. 68—71; Theobald, 229).

Children includes child *en ventre sa mère.*

As a gift by will to children living at the death or born within the lifetime of the testator includes a child *en ventre sa mère* at the testator's death (*Trower* v. *Butts*, 1 S. & S. 181; *Doe* v. *Clarke*, 2 H. Bl. 399), so a power to appoint to children similarly described may be exercised in favour of a child *en ventre sa mère* (Sug. Pow. 673). The theory is that the child is actually born at the period of distribution; if, therefore, it would have been illegitimate, if then actually born, it cannot take (*Re Corlass*, 1 Ch. D. 460). And it has been held that a

child *en ventre* is so much an object of a non-exclusive power that his exclusion invalidated an appointment, before Lord Selborne's Act, which gave him nothing (*Donoghue* v. *Brooke*, 9 I. R. Eq. 489).

A power created by will to appoint among children without more would allow appointments to be made to the children of any marriage (*Burrell* v. *Crutchley*, 15 Ves. 544; *Butcher* v. *Butcher*, 1 V. & B. 79, 91); but a contrary intention may appear, as in *Newman* v. *Piercey*, 4 Ch. D. 41. And the execution of a non-exclusive power in favour of the children of a first marriage, is not void upon the face of it; for the appointor may not marry again, or, if he do, may not have children (*Green* v. *Green*, 2 J. & L. 541).

Marriage settlements are usually so framed as to admit of no doubt that the children of the particular marriage only are intended; and in *Dafforne* v. *Goodman* (2 Vern. 362), where a term of years belonging to the husband was assigned in trust for the husband for life, with remainder in trust for the children of the body of the wife, it was held that her children by him must be intended.

According to the rule in *Wild's case* (6 Rep. 16 b), a devise of real estate to A. and his children gives an estate tail to A. if he has no child, or only a child *en ventre* (*Roper* v. *Roper*, L. R. 3 C. P. 32), at the time of the devise; and the addition of a power of appointment among the children does not exclude the rule (*Clifford* v. *Koe*, 5 App. Ca. 447). The rule does not apply to personal estate (*Audsley* v. *Horn*, 1 D. F. & J. 226).

Wife and children.

A gift to several persons *nominatim* without more is a gift in joint tenancy, and a gift to one on trust for himself and others bears the same construction: but there may be circumstances or expressions which will lead to a different conclusion. The circumstance, however, that the donees are the testator's wife and children is not of itself sufficient to prevent the application of the ordinary rule (*Newill* v. *Newill*, 7 Ch. 253). If, however, the gift be to A. on trust for himself and others as he shall appoint, it seems that the implication will be against a joint tenancy in default of appointment, and also against presuming

A. to be an object of the power. In *Crockett* v. *Crockett* (2 Ph. 553), a testator directed that all his property should be at the disposal of his wife for herself and her children. Lord Cottenham held that there was no joint tenancy, and seemed to incline to the opinion that a life estate to the widow with a power of appointment among the children was intended. He mentions an anonymous case in Dalison, 58, in which a man devised lands to his wife to dispose and employ them on herself or on his or her son or sons at her will and pleasure. It was held by C. J. Dyer and JJ. Weston and Walsh, that the wife took a fee simple, but that it was conditional, so that if the wife should alien to a stranger it would be a forfeiture (*Lambe* v. *Eames*, 6 Ch. 597; *Hanbury* v. *Tyrell*, 21 B. 322; and see *Bibby* v. *Thompson*, 32 B. 646; *Hart* v. *Tribe*, 1 D. J. & S. 418; *Armstrong* v. *Armstrong*, 7 Eq. 518; *Ward* v. *Grey*, 29 L. J. Ch. 74; *Mill* v. *Mill*, 9 I. R. Eq. 104; *Re Newsom*, 1 L. R. Ir. 373).

In *Re Sinclaire* (2 I. R. Eq. 45), a testator gave all his real and personal estate to his wife, her heirs, executors, and administrators in trust for her his said wife and the children of their marriage, in such shares and proportions and in such manner and form as the wife should by deed in her lifetime, or by will or codicil, appoint. The wife appointed to herself. In support of that appointment it was contended that the will contained a gift to the wife and children as joint tenants, with a superadded power to the wife to determine the quantity of the estate to herself and them by an appointment to be made by her. The Landed Estates Court held, however, that the true construction was a gift to the wife for life and to the children as she should appoint. The judge inclined to the opinion that in all cases where a parent is at once the donee and an object of a power, such power could not be validly exercised by the donee in favour of herself, leaving only a nominal portion unappointed. But it is submitted that the real question in each case is, Has the testator expressed his intention that the same person shall be donee and object? If the intention is clearly expressed, there is no reason why the donee should not appoint the whole to himself, if the power authorized an exclusive appointment, or fell within Lord

Can a parent be at once donee and object of the power?

Selborne's Act; or with a nominal exception, if it did not authorize such an appointment, or did not fall within the Act.

3. Grandchildren are not objects of a power of appointment among children (*Smith* v. *Lord Camelford*, 2 Ves. jun. 698). Grandchildren not objects of power to appoint among children.

If, therefore, A. has power to appoint a fund among his children, to whom it is given in default of appointment, and one child die, A. can make no provision out of the fund for that child's issue: he cannot appoint to the child's executors or administrators (*Maddison* v. *Andrew*, 1 Ves. sen. 57; *Re Susanni*, 26 W. R. 93); and any appointment previously made by will would lapse, and the Wills Act would afford no assistance (*Griffiths* v. *Gale*, 12 Sim. 327). He can, however, allow the fund, or (if there be a provision for hotchpot) a proportionate part of it, to devolve as in default of appointment, in which case, if the deceased child's share was vested at the time of his death, his estate would benefit.

Lord Mansfield says that "children" may in some cases be extended to grandchildren and great grandchildren (*Duke of Devonshire* v. *Cavendish*, 4 T. R. 744, n.); but the principles on which the dictum was founded are overruled (Sug. Pow. 667). And, where a testator gave all his estate to his wife to bring up his children, and when they came of age "to settle" on them what she should deem prudent, it was held that the wife could not appoint any interest to grandchildren (*Kennerley* v. *Kennerley*, 10 Ha. 160).

But grandchildren have been held to be objects of a power to appoint among children and their heirs, where it was clear that "heirs" was not a word of limitation. In *Fowler* v. *Cohu* (21 B. 360), there was a devise to A. for life, and after his death to "such of his children and their, his, or her heirs for such estates, &c." as A. should appoint, and in default of appointment, to the children of A. and the several and respective heirs of the body of all and every such children. The Master of the Rolls considered that the word "heirs" was *designatio personarum*, and Children and their heirs.

not a limitation of the estate. He thought that "heirs" must have been used to express the objects of the power, and not the interests they were to take; for otherwise it would be contradictory to give a power of appointing for *such estates*, and at the same time to direct that such appointment should be only in fee; and he thought that "heirs" meant "issue."

But a power of appointing among children "subject to such regulations and directions with regard to the settling of the shares for their separate use, and with, under, and subject to such powers, provisoes, conditions, and other restrictions and limitations over (such limitations over being for the benefit of some or one of them)," has been held not to authorize an appointment to grandchildren (*Hewitt* v. *Dacre*, 2 Keen, 622). The question in each case is, Who are the objects pointed out by the author of the power? and accordingly, where a testator uses the words "children" and "grandchildren" indiscriminately, the Court, upon a slight indication of intention, extends the word beyond its strict limits (*Hussey* v. *Dillon*, Amb. 602; S. C. *sub nom. Hussey* v. *Berkeley*, 2 Eden, 194).

Nephews and nieces.

And a power to appoint among nephews and nieces does not authorize an appointment to great-nephews and great-nieces (*Falkner* v. *Butler*, Ambl. 513; *Waring* v. *Lee*, 8 B. 247). *Primâ facie* nephews and nieces mean children of brothers and sisters, including those of the half-blood, although in some cases nephews and nieces by affinity may be included; (see *Wells* v. *Wells*, 18 Eq. 504; *Sherratt* v. *Mountford*, 8 Ch. 928; *Re Blower*, 6 Ch. 351).

Issue.

4. The term "issue" (whether in a deed or in a will) *primâ facie* means descendants; and a power to appoint among issue includes all issue, however remote, born in the lifetime of the donee of the power (*Hockley* v. *Mawbey*, 1 Ves. jun. 143, 150; *Donoghue* v. *Brooke*, 9 I. R. Eq. 489; *Re Howard*, 7 Ir. Ch. R. 344).

This generality may, however, be restrained by the design

and tenor of the will; but the *onus probandi* is on the person desiring to restrict the generality (*Leigh* v. *Norbury*, 13 Ves. 344; *Re Denis*, 10 I. R. Eq. 81). An example of this is given by the rule in *Sibley* v. *Perry* (7 Ves. 522), viz. that where the "parent" of "issue" is spoken of, the word "issue" is *primâ facie* restricted to mean children of that parent. The rule applies equally to deeds and wills (*Pruen* v. *Osborne*, 11 Sim. 132; and see *Lees* v. *Lees*, 5 I. R. Eq. 549).

Restricted by subsequent expressions in executory instrument or will.

The generality of the term may also be restricted by subsequent expressions in the instrument creating the power, if such instrument be executory, or be a will. In *Swift* v. *Swift* (8 Sim. 168), a fund was settled by marriage articles (after successive life estates to the husband and wife) on the *issue* of the marriage, in case there should be any living at the death of the husband and wife, in such manner, shares, and proportions as the husband should appoint, and for want of such appointment, to such *issue*, share and share alike if more than one, and if but one, then the whole to go to *such only child;* and in case there should not be *any issue of the marriage* living at the death of the survivor of the husband and wife, then over. The Vice-Chancellor thought that the expression "and if but one," the whole to go to such only child, was demonstrative that the word "issue" meant children.

In that case, it is to be observed that the articles which created the power were executory; (see, too, *Edwards* v. *Edwards*, 12 B. 97; *Dalzell* v. *Welch*, 2 Sim. 319, where the power was created by a will).

"There are two classes of cases on the construction of the word 'issue': those which relate to settlements, and those which relate to wills. The Court has often laid it down that marriage articles are to be treated only as a memorandum of instructions, which are to be carried out in such a way as to effect the intention of the parties. But the Court never deals in that way with an executed instrument; it always takes such an instrument as it finds it. With regard to wills, the Court always looks at the intention of the testator, and adopts in practice, if not in theory, a much more benignant rule of con-

struction" (*Re Warren*, 26 Ch. D. at p. 217; see, however, *Re Dixon*, 4 I. R. Eq. 1, where the Court of Appeal appear to have thought that "issue" in a marriage settlement has a different *primâ facie* meaning from that which it bears in other instruments (*sed qu.*)). The meaning is not restricted because the gift over in default of appointment in a settlement is to children (*Donoghue* v. *Brooke*, 9 I. R. Eq. 489; and see *Re Meade*, 7 L. R. Ir. 51; *Re Denis*, 10 I. R. Eq. 81).

There is a curious case of *Norman* v. *Norman* (Beat. 430), in which a testator gave A. (in certain events which happened) power to charge real estate with 3,000*l.* "as and for a provision for his lawful issue;" and A. by deed charged the estate with the sum of 3,000*l.* "as a provision for his lawful issue." L. C. Hart regarded the case as one of portions, to be dealt with on the principles peculiar to portions, and held that all the children living were entitled; that the eldest son (who had attained twenty-one) took a vested interest in an aliquot portion of the fund; that infants did not take a transmissible interest before they required it, but that their shares vested only as each from time to time required a portion; and that, as each share vested, the remaining fund became divisible amongst all persons then *in esse*, and not before provided for, as on a new period of distribution. Lord St. Leonards (Sug. Pow. 675) points out that the decree produced inequality amongst the issue, and might exclude some to come *in esse;* and says that it was an attempt to make a settlement not warranted by the deed executing the power.

Secus, in executed instrument.

But if the power is contained in an executed instrument, the Court will not readily adopt a construction that will cut down the word "issue" to "children." In *Harrison* v. *Symons* (14 W. R. 959), a settlement contained a power of appointment (in the events which happened) among all or any one or more of the brothers and sisters of A. who should be then living and the *issue* of any one or more of them who should be then dead leaving *issue*, in such shares, &c. as the said A. should by deed or will appoint; and the trust fund was limited in default of such appointment on trust for all the brothers and sisters who should be then living of A. and the *issue* of any of her brothers

and sisters who should be then dead, the *issue* of any deceased brother or sister to take only such share as such brother or sister would have taken in case he or she had been then living, and the *children* of each deceased brother and sister, if more than one, to take in equal shares as tenants in common. V.-C. Wood held that the word "issue" was not to be restricted to children.

Children substituted for parents.

5. It is a question of construction, to be decided according to the intention expressed in each case, whether a clause of substitution will make the substituted persons objects of the power, or merely entitle them to the benefit of the gift in default of appointment.

In *Fox* v. *Gregg* (Sug. Pow. 946), a testator gave his wife power to appoint among certain of her cousins "in such shares and proportions, manner, and form" as she should direct, and in default among them equally; and he provided that the children of such of his cousins as were then dead or as should die in his wife's lifetime should "stand in the place of their deceased parent or parents," and be entitled to such interest as the parents would have taken if they had survived the wife. The wife appointed in such a manner as to make it necessary to decide whether the power was a non-exclusive one and embraced the cousins living at the wife's death and the children of such as were then dead. It was held that it was; the substituted children were held to be objects as much of the power of appointment as of the gift in default.

In *Neatherway* v. *Fry* (Kay, 172), there was a bequest of residue in trust after the death of the testator's wife, to be divided amongst all his children, including A. if then living, in such manner and proportion as the testator's wife should by will appoint, provided that A.'s share should not be less than that of any of the other children; and in default of appointment, to be divided among all the testator's children living at his wife's death, including A. Moreover, if any child should happen to die before the testator's wife, leaving children, such children to have the *share* of their deceased parent. This power was held not to include the children's children as objects: their interest

was confined to the gift in default of appointment; (see both these decisions observed on, Sug. Pow. 690).

Power to appoint among younger children.

6. Under a power of appointing portions to younger children as a class, an eldest son, whether such by birth or survivorship, can take no benefit: and that too, although an appointment has been made to him when he was actually a younger son, in consideration of marriage (*Chadwick* v. *Doleman*, 2 Vern. 528).

The same rule applies to a gift in default of appointment. "There is no sound distinction between construing that tacit condition of the continuance of the capacity of a younger child in the execution of the power of appointment, and in default thereof" (*Lord Teynham* v. *Webb*, 2 Ves. sen. at p. 212).

If a provision is made for the eldest son, and then other benefits are given to the younger children, the intention is taken to be that the person who becomes entitled to the provision intended for the eldest son shall not take any part of the benefits provided for the younger children, although, at the time when such interest vested, he was one of the younger children; and conversely, it is held that a younger child who becomes the eldest, although strictly excluded from sharing in the benefits provided for younger children, yet if he does not take the provision made for the eldest son, by reason of its having been disposed of by his elder brother in his lifetime, is not treated as the eldest son, so as to be excluded from taking his share with the younger children (*Matthews* v. *Paul*, 3 Sw. 328; *Collingwood* v. *Stanhope*, L. R. 4 H. L. 43).

It is now well-established law, that where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child taking the bulk of the estate by virtue of the limitations in strict settlement shall take any benefit from the portions: and this is so, whether the settlement does or does not contain an express provision to exclude him from a share in such portions

(*Macoubrey* v. *Jones*, 2 K. & J. 684; *Davies* v. *Huguenin*, 1 H. & M. 730).

It depends on the intention of the settlor or testator in each case; thus the fact of the eldest son being excluded by name would be material (*Wood* v. *Wood*, 4 Eq. 48); but the rule is the same whether the property be real or personal (*Re Bayley*, 6 Ch. 590).

In *Chadwick* v. *Doleman* (2 Vern. 528), A. was tenant for life, with remainder to trustees to raise 4,000*l.* for his younger children as he should appoint, with remainder to his first and other sons in tail. The father irrevocably appointed 2,600*l.* to B. the second son. The eldest son died six years after: B. thereupon became eldest son, and A. made another appointment of the 2,600*l.* It was held that the first appointment was defeasible, not from any power of revoking or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition that he should not afterwards happen to become the eldest son and heir. This doctrine of a tacit condition has been recognized in *Savage* v. *Carroll* (1 B. & B. 265); *Lord Teynham* v. *Webb* (2 Ves. sen. 198); *Hall* v. *Hewer* (Ambl. 203); *Lady Lincoln* v. *Pelham* (10 Ves. 166); *Bowles* v. *Bowles* (10 Ves. 177; *per* Sir Thomas Plumer, 3 Sw. 340; Sug. Pow. 619).

The power must be to appoint among, or the gift must be to younger children as a class and not persons named: a younger child who is named as an object by the author of the power will take under an appointment to him, although he becomes the eldest son. In *Jermyn* v. *Fellows* (Ca. t. Tal. 93), a power was given by Act of Parliament to a father to appoint among his younger children A., B., and C. A. by his eldest brother's death became entitled to the provision made for the eldest son; but a subsequent appointment to A. was held good.

The objects must be younger children as a class.

The rule last stated must, however, be taken subject to these qualifications:

In order to exclude an eldest son from being

Qualification of last stated rule.

an object of a power to appoint portions among younger children as a class, such eldest son must take the estate under the instrument of settlement; and such estate must be settled, whether by marriage settlement or other instrument or will, by some person standing *in loco parentis*.

The eldest son must take the estate.

The term "eldest son" does not mean firstborn son, but the son who takes the family estate under the settlement (*Collingwood* v. *Stanhope*, L. R. 4 H. L. 43). "Eldership not carrying the estate along with it is not such an eldership as will exclude" (*Duke* v. *Doidge*, 2 Ves. sen. 203 n.; *Re Theed*, 3 K. & J. 375).

In *Domvile* v. *Winnington* (26 Ch. D. 382), a fund was settled by deed in trust for A. for life, and after her death for all her children, except an eldest or only son, who should attain twenty-one or marry. The settlement was not made by a person *in loco parentis*, nor did it contain any reference to the family estate: and it was held that eldest son had its ordinary signification, *i. e.*, firstborn, as in the case of a limitation (*Meredith* v. *Treffry*, 12 Ch. D. 170), or a shifting clause (*Wilbraham* v. *Scarisbrick*, 1 H. L. C. 167; and see *Bathurst* v. *Errington*, 2 Ap. Ca. 698).

But if the words and intention are clear, a younger son becoming an eldest son will be excluded, although he takes no other provision. In *Livesey* v. *Livesey* (2 H. L. C. 419), the testatrix gave the eldest son of E. ten guineas, because he would have a handsome provision from other sources, and she gave one moiety of her residuary estate on trust to be divided among the children of E. then or thereafter to be born, except her eldest son, *or such of her sons as should by the death of his brother become an eldest son*. The eldest son of E. was in fact handsomely provided for; he died, but the second son, who thereupon became the eldest, did not succeed to the provision: he was nevertheless excluded. The Court thought that such provision was not the reason for the exclusion; for, by a subsequent clause in the will, the eldest daughter was also excluded, and the clause of exclusion in the will had no reference to the fact of the

person to be excluded taking other property, and therefore the period of vesting was alone to be regarded. If the Court had thought that the reason for the exclusion was that the elder son took some other estate, they would probably have come to a different decision (*per* V.-C. Wood, 3 K. & J. 381).

The fact that the estate is entirely exhausted by providing the portions is no ground for giving the eldest son a portion (*Reid* v. *Hoare*, 26 Ch. D. 363). The principle that an elder child unprovided for shall be deemed a younger, means an elder child unprovided for by the settlement or will itself, or by means which were in the contemplation of the parties making the settlement or will (*Peacocke* v. *Pares*, 2 Keen, 689).

Eldest son must take under the settlement.

The principle of *Chadwick* v. *Doleman* does not apply to a younger son succeeding to the reversion of the settled estates, not under the settlement, but by descent (*Sing* v. *Leslie*, 2 H. & M. 68). The principle that there is a tacit condition, that a younger son, becoming entitled to property limited by a settlement, shall be treated not as a younger but as an eldest son, in respect of that settlement, applies only to cases where he takes under such settlement.

It may be that, notwithstanding that the words in the settlement are "entitled under the before-mentioned limitations to the settled estates," if a resettlement is made which simply reproduces the limitations of the settlement with an overriding joint power of appointment which has never been exercised, a court of equity would regard the substance of the transaction, and hold that, as the original settlement was left in the result unaffected, the disentailing deed and resettlement might be disregarded (*Re Fitzgerald*, 1891, 3 Ch. at p. 398; *Wyndham* v. *Fane*, 11 Ha. 287). But if this be so, it does not apply to a case where the eldest son has joined in executing the joint power by way of mortgage, and has taken out of the estate a sum equal to the amount that as younger son he would have been entitled to as a portion (*ibid.*). In the cases of shifting uses, where the eldest son becomes entitled to another estate, the whole estate must substantially be acquired (*Meyrick* v. *Laws*, 9 Ch. 237). But the analogy of this class of cases must not be pressed too far;

for it must be remembered that different considerations apply to the case of portions for younger children (*Collingwood* v. *Stanhope*, L. R. 4 H. L. 43).

So, where under a power in a marriage settlement uses are revoked and new uses declared, whereby a younger child, who has since become an eldest son, takes through the mere bounty of the donor property which, but for such revocation, he would have taken as eldest son under the settlement, he does not thereby cease to be entitled to the portion of a younger child under the settlement (*Wandesforde* v. *Carrick*, 5 I. R. Eq. 486; and see *Johnson* v. *Foulds*, 5 Eq. 268).

Settlement must be made by parent.

Not only must the eldest son take the estate under the instrument of settlement, but such instrument must be made by some person standing to him *in loco parentis*.

In *Sandeman* v. *Mackenzie* (1 J. & H. 613), by a marriage settlement the husband covenanted to pay 10,000*l.* for the children of the marriage; and for want of such children, for the children of the wife by a former marriage (other than A. her eldest son), as the husband should appoint; and in default, for all who should attain twenty-one equally, or if but one, then for such one younger child. There were no children of this marriage, but there were two children besides A. of the first marriage; all attained twenty-one. A. died, but it was held that the second son, who thereupon became the eldest and succeeded to the family estates, was not excluded from the benefits of the settlement, for the husband stood in no parental relation to him. It is to be observed that the eldest son was excluded by name in this case; but the decision was not founded on that; (and see *Hall* v. *Hewer*, Ambl. 203).

In *Lord Teynham* v. *Webb* (2 Ves. sen. 198), there was a power of appointment among younger children, and a younger child became eldest and was excluded; the settlor and author of the power was the grandmother. In *Lady Lincoln* v. *Pelham* (10 Ves. 166), the testator was the grandfather.

Period for ascertaining the class of

The period when the fund becomes distributable is the period for ascertaining the true

construction of the instrument of settlement and the position of the children *inter se* (*Collingwood* v. *Stanhope*, L. R. 4 H. L. 43). younger children.

With regard to all questions arising on provisions for children under marriage settlements, the Court imputes to the parties (however differently that intent may be expressed, so long as it is not contrary to what is actually found in the settlement) a desire to provide equally for the children, that no child should take a double portion, and that no child should be excluded (*ibid.* 52).

This principle seems applicable also, though perhaps to a less degree, to wills made by persons in favour of objects to whom they stand *in loco parentis*.

It follows therefore that, although it should be said in terms that the elder child is not to have a portion, yet if under such a settlement the one who is really the elder child does not take the family estate, then, the family estate going to a younger son, the Court regards not the elder born, but the younger brother who is in possession of the family estate, as the elder, and the actually elder as the younger, in order to introduce him into the benefits of the portions provided for younger children. The Court will not allow portions to be indefeasibly vested so as to give a double portion to one child and exclude another. Although one child has held the place of a younger child during the period that the settlement has been in existence—that is to say, subsequent to the marriage of the parents—and has therefore become entitled to a portion, and has even had a portion assigned to him, yet if at the period of distribution that child has become an eldest child, then he is no longer entitled to a portion, and the portion which has been assured to him is no longer his; he takes the family estate and the rest of the children are let in as younger children to the benefit of the fund out of which the portions are to be provided, including that portion of the fund which had been assigned to him who has now become the elder child (*ibid.* 53). This would appear to extend to cases where the portion has been not merely Must a portion appointed and paid be refunded?

appointed but has actually been paid over, if such payment has not been made by means of a release of the appointor's life interest. Lord St. Leonards (Pow. 680) says that the change of character must take place before the receipt of the money; that clearly a younger son becoming eldest and taking the estate, cannot be called upon to refund a portion received out of the estate whilst he was a younger child and in that character; but this can hardly be intended to apply to cases where the portion has been advanced before the period at which it would have been naturally payable.

When the eldest born's estate is entitled to benefit of portion.

If the elder child, entitled in reversion on the death of his parents, predeceases them, so that he never becomes owner in possession of the estate, but his next brother acquires the ownership, the estate of the deceased eldest born is entitled through his executors to a share in the provision intended for those who did not take the family estate (*Ellison* v. *Thomas*, 1 D. J. & S. 18; *Davies* v. *Huguenin*, 1 H. & M. 730).

When the eldest son prevents estate from devolving on him by his own act.

But it will be otherwise if the eldest son has himself by his own action prevented the estate from devolving on him under the settlement, by anticipating it for the purpose of resettlement or otherwise. In *Collingwood* v. *Stanhope* (L. R. 4 H. L. 43), the eldest son was tenant in tail: he joined with his father in barring the entail and re-settling the estate; in that case he was held to have had the full benefit of the estates and to be within the words "the eldest son entitled under the will"; (and see *Re Fitzgerald*, 1891, 3 Ch. 394).

Who are objects of a power to appoint among relations.

7. A power of appointment among the "relations" or the "family" of the testator or of A., can be well exercised by an appointment to any relations, although not within the degree of next of kin, if the power authorizes selection (*Grant* v. *Lynam*, 4 Russ. 292; *Harding* v. *Glyn*, 2 W. & T. L. C.). But if the power authorizes distribution merely, and not selection, the donee is confined to the

next of kin according to the statute (*Pope* v. *Whitcombe*, 3 Mer. 689).

"The word relations in gifts of this character has received a settled meaning: and the only point is whether the executors had under the will a power of selection, or a simple power of distribution. It is plain that in the latter case they must confine themselves to the class falling within the limits of the Statute of Distributions" (*per* Sullivan, M. R., in *Lawlor* v. *Henderson*, 10 I. R. Eq. 150). It has not been decided whether Lord Selborne's Act has affected this rule.

"Family." The primary meaning of the word "family" is children (*Pigg* v. *Clarke*, 3 Ch. D. 672). It does not, in the will of a married man, include his wife (*Re Hutchinson and Tenant*, 8 Ch. D. 540; and see *Commissioners of Charitable Donations* v. *Deey*, 27 L. R. Ir. 289). But there may, of course, be a context which shows that the word has been used in a secondary sense. Thus, in *Macleroth* v. *Bacon* (5 Ves. 159), a power to appoint for the benefit of a married woman and her family was on the construction of the whole will held well executed by an appointment to her husband. And the instrument containing the power may itself furnish an interpretation of the expression. In *White* v. *Briggs* (15 Sim. 17), a testator directed that the property which he had given by his will to A. should be "secured for the benefit of his family." In the same will he used "heirs" and "family" as synonymous terms. The Vice-Chancellor thought that by family he meant the children, but not the wife, of A.

Illegitimate child. In *Lambe* v. *Eames* (6 Ch. 597), L. J. James seemed to consider it the better opinion that a gift to A. "to be at her disposal in any way she may think best for the benefit of herself and family," gave A. the property absolutely. But if it did not, he held that an appointment thereunder to an illegitimate child was valid. He said that it was impossible to put any restriction on the meaning of the word, or to exclude any person who, in ordinary parlance, would be considered within the meaning.

The word might include sons-in-law and daughters-in-law and many others.

Family or next of kin.

In *Snow* v. *Teed* (9 Eq. 622), a power to an unmarried woman to appoint a fund amongst her own "family or next of kin" was held well exercised by an appointment to a nephew, nieces, and a great niece in unequal shares. The power authorized appointments to any person related to the donee in the ordinary acceptation of the word family, which would not, strictly speaking, be confined to statutory next of kin; (and see *Re Susanni*, 26 W. R. 93).

Heirs of the body.

In *Re Jeaffreson* (2 Eq. 276), there was a gift to trustees on trust to pay the fund to the heirs of the body of A. at their respective ages of twenty-one, in such proportions as A. should appoint. The objects of the gift and power (which, it will be observed, is a non-exclusive one) were held to be such of the statutory next of kin of A. as were descended from her.

In *Sinnott* v. *Walsh* (5 L. R. Ir. 27), there was a devise in 1837 to the testator's two sons, followed by the words "should either of my sons die in my lifetime without issue, his part of the property to fall to whatever existing member of my family he may will it to." This term was held to be *nomen collectivum*, authorizing a testamentary appointment to one or more persons; (and see *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Marsh* v. *Marsh*, 1 B. C. C. 293; *Boys* v. *Bradley*, 17 Jur. 159).

What relations are entitled in default of appointment.

8. If the power be not executed, the fund will, without reference to the power having been exclusive or merely distributive, be divided amongst those only who would take under a gift in like terms if no power had been created, unless a contrary intent appear in the instrument (Sug. Pow. 659).

A gift to the relations of a man, or to his family if he had died without a child, would *primâ facie* include all persons related in however remote a degree: but such a construction would make the gift void for uncertainty. In order to obviate this, it is settled that a gift to relations or family is confined to the next of kin according to the Statute of Distributions, unless there are special expressions showing a different import (*Mahon* v. *Savage*, 1 S. &

L. 111; *Hibbert* v. *Hibbert*, 15 Eq. 372; *Wilson* v. *Duguid*, 24 Ch. D. 251). "Where the Court holds that there is a trust in default of appointment, wherever it is a trust for relations, the Court puts the construction upon it that if it be a gift to one for life, and after the gift to that person, a gift to the relations of that person, it is the next of kin of that person" (*per* V.-C. Kindersley, *Re Caplin*, 34 L. J. Ch. 580; 2 Dr. & Sm. 527). The construction is the same if the gift be to "friends or relations" (*ibid.*), or "to friends and relations" (*Gower* v. *Mainwaring*, 2 Ves. sen. 86).

In what shares they take.

The Court has said, however, that the claimants shall not always take in the proportions of the statute, if the testator has indicated any contrary intention: as for instance, where there has been a power of appointing among "brother and brother's sons," or "children or their issue," the Court has held that under the implied gift all the objects of the power took, not by representation, but *per capita* (*Green* v. *Howard*, 1 Bro. C. C. 32; *Re White*, John. 656). So, a gift of residue to be distributed "to my relations share and share alike as the law directs," was held to mean a distribution under the Statute of Distributions, and not *per capita* (*Fielden* v. *Ashworth*, 20 Eq. 410).

As joint tenants.

And although under a gift to the persons who would be entitled under the Statute of Distributions, or to the persons entitled under the Statute as next of kin, the persons entitled would take in the statutory shares and not in joint tenancy (*Bullock* v. *Downes*, 9 H. L. C. 1), if the gift be to "relations" *simpliciter*, they will take as joint tenants (*Eagles* v. *Le Breton*, 15 Eq. 148). And as to children, see *Re Phene* (5 Eq. 346); *Armstrong* v. *Armstrong* (7 Eq. 518).

Real estate.

And as the objects take under the will and not as under an intestacy, they can take real estate (*Walter* v. *Maunde*, 19 Ves. 424).

Wife.

Under a gift by will to the testator's relations, his wife cannot take, for the statute provides for her by the name of wife (*Green* v. *Howard*, 1 Bro. C. C. 32).

Who take in default of appointment

Where a life interest is given by will to a party, with power to select the relations (that is, to such as he shall appoint), it is

when there is a previous life estate.

firmly settled that, in default of appointment, the persons entitled are not the relations living at the testator's death, but those who are living at the death of the donee of the power (Sug. Pow. 661, citing *Doyley* v. *A.-G.*, 4 Vin. Abr. 485; *Re Caplin*, 2 Dr. & Sm. 527; *Cruwys* v. *Colman*, 9 Ves. 319). And the rule is the same if the power be one of distribution merely, and not of selection (*Finch* v. *Hollingsworth*, 21 B. 112, correcting the report of *Pope* v. *Whitcombe*, 3 Mer. 689). "A decision in the contrary way might be productive of great inconvenience: in many cases it might be impossible for the donee to exercise the power, for all the relations living at the testator's death might be dead at the decease of the donee of the power, and therefore there might then be no person in whose favour an appointment could be made" (21 B. 116). This, however, is a different proposition from that of Lord St. Leonards, for it makes the objects a hypothetical class, not the actual next of kin; (cf. *Bullock* v. *Downes*, 9 H. L. C. 1).

Where no preceding life estate.

But where the distribution or selection is not suspended by the existence of any preceding estates for life, those who are to take are such as answered the description of next of kin of the testator at his death (*Cole* v. *Wade*, 16 Ves. 27; and see *ante*, p. 490).

Particular class pointed out.

9. If a particular class is pointed out, the donee is confined to that class, and to that class alone the Court will give it in default of execution.

"Nearest."

In *Goodinge* v. *Goodinge* (1 Ves. sen. 231), a bequest to such of the testator's *nearest relations* as A. should think poor and objects of charity, was confined to relations within the Statute of Distributions.

In *Smith* v. *Campbell* (19 Ves. 400), a devise to "nearest relations" was confined to brothers and sisters. And "next of kin" *simpliciter* has been held to mean "nearest of kin," and not according to the statute (*Elmsley* v. *Young*, 2 M. & K. 780).

"Poor."

The addition of the word "poor" will not operate to extend the gift to relations beyond the statutory limit: although, if the power authorizes selection, the donee may appoint to relations

not within the limit who are poor (*Grant* v. *Lynam*, 4 Russ. 292).

In *Widmore* v. *Woodroffe* (Ambl. 636, 640), the Lord Chancellor said:—"Several cases have been cited, all proceeding upon the same ground, making the Statute of Distributions the rule, to prevent an inquiry which would be infinite and would extend to relations *ad infinitum*. The Court cannot stop at any other line. Thus it would clearly stand on the word relations only: the word 'poor' being added makes no difference. There are no distinguishing degrees of poverty; and therefore the Court has construed the will as if the word 'poor' was not in it."

Mahon v. *Savage* (1 S. & L. 111) seems to be to the same effect: see the second point there decided. But the word "poor" is not nugatory as amongst the statutory relations; *i.e.*, although a gift to poor relations is not enlarged by the word "poor" so as to include relations not within the statutory limit, who are poor, yet in deciding the claims of the statutory relations between themselves, their poverty or affluence is to be taken into consideration.

There is no very recent case on the point; but the remarks of the Lord Chancellor in *Widmore* v. *Woodroffe*, showing the reason for the rule excluding relations beyond the statutory limit notwithstanding their poverty, do not apply when the relations are a class easily ascertainable, and the question is merely between their claims; and it is to be observed that in that case the defendant was the only next of kin of the testator; (and see *Thomas* v. *Howell*, 18 Eq. 198).

In *Brunsden* v. *Woolredge* (Ambl. 507), a direction that a sum should be equally distributed amongst the testator's mother's poor relations, was construed to mean such of the mother's statutory next of kin as were poor.

In *Mahon* v. *Savage* (1 S. & L. 111), the testator bequeathed 1,000*l.* to his executor to be distributed amongst his poor relations or such other objects of charity as should be mentioned in his private instructions to his executors. No such instructions were left. One of the statutory relations was a poor man at the

time of the testator's death, but had become rich previously to the direction to the Master to inquire and report. The Lord Chancellor was of opinion that it was meant as a charitable bequest, and that the objects of the charity should be the testator's own relations: that it was nothing more than ascertaining a number of objects of charity, who could not claim except they were such.

In *Green* v. *Howard* (1 Br. C. C. 33), the Lord Chancellor says *obiter* that "where a testator has said 'to relations according to their greater need,'" the Court has shown particular favour to one.

If, however, the power is not to be exercised at once, but contemplates a perpetuity, the gift must be charitable or fail: and, if it is charitable, it is not confined to statutory next of kin (*Isaac* v. *Defriez*, Ambl. 595; 17 Ves. 373, n.; and see *Gillam* v. *Taylor*, 16 Eq. 581, commented on by Jessel, M. R., in *Attorney-General* v. *Duke of Northumberland*, 7 Ch. D. 751).

CHAPTER XIV.

POWERS OF JOINTURING.

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1. As a general rule, where there are several appointments made by the same instrument in execution of the same power, they all rank equally; but where there are several appointments made by different instruments, they rank according to date (*Bulteel* v. *Plummer*, 6 Ch. 160; *Re Lord Annaly*, 23 L. R. Ir. 481; *Wilson* v. *Kenrick*, 31 Ch. D. 658). But when there are appointments made under different and distinct powers, other considerations arise. In order to determine the priority of appointments made under such powers the estates created must be referred to the instrument creating the power; the general rule is that— Priority of estates created under powers.

> Estates authorized to be created under powers take effect, when created, as if they had been inserted in the original instrument containing the power (*Lord Braybrooke* v. *Attorney-General*, 9 H. L. C. 150).

"Whenever parties have power by deed to do a particular act, when done under the power, it is as if incorporated in the

original deed when executed" (*Uxbridge* v. *Bayly*, 1 Ves. jun. at p. 510). If, therefore, an instrument creates estates and also gives a power of appointing charges of any sort, whether for jointure, portions or otherwise, the estates authorized to be created by the power will, on being called into existence, take precedence of the estates in the settlement, unless there be a contrary intention expressed.

In *Beale* v. *Beale* (1 P. W. 244), lands were settled on A. for life, remainder to such woman as he should marry for life, remainders over, with power to charge the premises with any sum of money; such power, unless there be inserted a clause to the contrary, will, like a power of leasing, overreach all the estates; (see this case and the appeal therefrom, Gilb. Eq. R. 93, observed on Sug. Pow. 486). Lord St. Leonards says there, "If the rule is universally in favour of portions, there is no distinction between a jointure and portions: but either, when raised by means of a power, will prevail over the other, if actually created by the settlement itself. There would, however, be no difficulty in drawing a distinction between the two charges, which is pointed out by their nature. Where they come into competition, the jointure should precede the portions. Where both are created by powers, and although the portions are first charged, a jointure would, it is apprehended, prevail over portions. Upon the same principle a jointure, although limited by the deed creating a power to charge portions, might be allowed to prevail over the portions when charged. The proper place in the settlement in which to insert such a charge is after the life estate of the father, and subject to the jointure of the wife; for such is the position assigned to it in all settlements."

The question must depend on the intention of the settlor or testator in the particular case, and on the nature of the power. In *Mosley* v. *Mosley* (5 Ves. 248), a settlement by father and son created terms of years to raise portions for the younger children of the father; a power was given to the son, subject to the father's life estate, to charge portions for his younger children. The son exercised his power; and the charges created thereby were held to have priority over the charges secured by

the terms of years in the settlement for the father's younger children. The Master of the Rolls said: "The moment the power is executed, it is as if in the original deed, and in that way it will stand now. This power is subject to the father's life estate; it must be taken as if made subsequently to the life estate of the father. As soon as he has executed that power, that term comes in immediately after the estate of his father, before the other terms, but not before his life estate. . . . The moment he raises the term it is put in after the life of his father to which the power is subject. I cannot, in point of conveyancing, put it anywhere else. It may be a blunder of the conveyancer. . . . That it is strange, must not be talked of either upon a deed or upon a will; but I must ask, what is the construction?" In *Bevan* v. *Bevan* (13 L. R. Ir. 53), the Master of the Rolls held that portions had priority over a jointure on the ground of the position in the settlement of the term for raising the portions; and he said that *Mosley* v. *Mosley* was decided on the position of the terms of years in the settlement of 1784, and not in the original settlement of 1782. In *Bevan* v. *Bevan*, the term of years was prior to the life estate of the donee of the jointuring power.

In *Simpson* v. *O'Sullivan* (7 C. & F. 550), lands were settled on A. for life with remainder to trustees to raise an annuity for A.'s widow for her jointure; and the settlement contained a power for A. to raise a sum for his own benefit; the power, when exercised, overrode the widow's annuity.

In *Bailey* v. *Tennant* (11 Ex. 776), lands were vested in the trustees of a marriage settlement for a term of years to secure portions for younger children of that marriage; and the settlement also contained a power for the husband to jointure a future wife. The power was eventually exercised, a term being limited to secure the jointure. This jointure was held to take priority over the term for raising portions for the children of the first marriage.

In *Re Lord Annaly* (23 L. R. Ir. 481), the tenant for life had power to appoint a jointure without prejudice to any prior subsisting uses or powers; and his life estate was subject to the

trusts of a term already carved out of it. It was held that the jointure also was subject to these trusts.

In *Re Creagh* (25 L. R. Ir. 128), the life tenants under a will had powers of jointuring wives and portioning younger children. They joined with the tenants in tail in remainder in re-settling the estate, and by the re-settlement gave to the two first life tenants power to charge gross sums for their own benefit, and also gave them power, when in actual possession, to jointure and charge portions. The jointures and portions were held to be subsequent to the gross sums charged under these powers.

Marshalling.

It has been held that the doctrine of marshalling, as applied in *Averall* v. *Wade* (Ll. & G. 253), extends to the case of a man who reserves a power to himself as well as to that of a man who retains an estate. In *Re Barker* (3 L. R. Ir. 395), a marriage settlement recited that charges existed on the settled estates to the amount of 65,000*l.* or thereabouts, and the settlor covenanted against all other incumbrances, and reserved to himself power to charge the settled estates in priority to the uses declared by the settlement with such sums as, together with the 65,000*l.*, should not exceed 84,000*l.* The incumbrances on the settled estates were in fact 78,500*l.* The settlor mortgaged under his power; and the Landed Estates Court held that the covenant against incumbrances gave the beneficiaries an equity against the settlor's appointees to the extent of the difference between the 65,000*l.* and the 78,500*l.* The learned judge bases his decision on the doctrine of *Averall* v. *Wade;* but it is submitted that it was really a question of excess of power. The appointor had power only to make up the charges on the estate to 84,000*l.*; his appointee could not claim against the beneficiaries to any extent beyond 84,000*l.*; and it was for them to show the appointor's title; and they could only do this to the extent of the difference between 78,500*l.* and 84,000*l.*

Priority of powers in the same instrument *inter se.*

Where several powers have been given by the same deed, and two or more of them are executed, and no provision has been made in regard to their priorities, the intention of the settlement and the object of the powers are the best guides to the construction (Sug. Pow. 488).

Priority of jointure.

A jointure takes effect from the nature of things immediately upon the husband's death. It will, as a general rule, override all powers and estates in the same settlement; unless it be otherwise provided by the instrument creating the power (Sug. Pow. 485; *Hall* v. *Carter*, 2 Atk. 354; *Sandys* v. *Sandys*, 1 P. W. 707; *Reynolds* v. *Meyrick*, 1 Eden, 48).

It will be otherwise if the portions are in effect appointed under a power in a *former* settlement (*Re Nash*, 5 Ir. Ch. R. 384).

And if a jointure, when it arises, is intended by the creator of the power to take effect merely as one of several rent-charges or annuities, it will have no precedence, and on a deficiency of assets must abate with the other annuities *pari passu*. Thus in *Coore* v. *Todd* (7 D. M. & G. 520), a testator devised lands to trustees on trust out of the rents to pay an annuity to A. B. until he attained twenty-five (when he was to have possession of the estates), and an annuity of 400*l.* a year to C. D. for life, and an annuity of 150*l.* for the maintenance of any infant tenant in tail during minority; and without prejudice to the trusts aforesaid, and to any jointure to be created under the power thereinafter contained, to pay the surplus rent to the mother of A. B. until he should be entitled to possession of the estates, and subject to the trusts aforesaid, the trustees were to hold the estates in trust for A. B. for life, with remainder to his eldest son in tail, with power to A. B. to appoint a jointure to any wife, with usual powers of distress and entry, to take effect immediately after his decease. A. B. appointed a jointure under his power and died, leaving his widow, who gave birth to a posthumous child, who became tenant in tail. The income proved deficient; and it was held that C. D.'s annuity, the maintenance annuity of the infant tenant in tail, and the jointure must abate rateably; but that there should be no retrospective apportionment so as to affect the amount received by C. D. previously to the birth of the infant tenant in tail.

Lord St. Leonards concludes that with respect to the ordinary powers in a settlement, their relative priorities may be left to the operation of law, since the order in which they take effect

is matter of inference from their nature; to which Mr. Davidson (vol. iii. 489) adds, that with settlements containing powers of charging for the donee's own benefit, or for other persons not comprised in the ordinary and recognized scheme of strict settlement, it is proper to define with exactness the extent to which it is intended that they shall override the settlement.

Priority of powers of sale, &c.

Powers of sale, exchange, and partition, necessarily override all estates created by the settlement, unless there be any intention expressed to the contrary, and subject to any estates which have been created under paramount powers (Sug. Pow. 482-3). But powers of leasing generally or always have precedence, although there be no clause marshalling the powers (*per* V.-C. Knight-Bruce, 1 De G. & Sm. 659). It holds generally true that a power to create leases to take effect in possession will control and overreach all the powers and estates in the settlement (Sug. Pow. 483; *Lewis* v. *Rees*, 3 K. & J. 149, 150; *Isherwood* v. *Oldknow*, 3 M. & S. 404-5; *Doe* v. *Thomas*, 9 B. & C. 288; *Yelland* v. *Fielis*, Moore, 788).

In *Taylor* v. *Stibbert* (2 Ves. jun. 437), a purchaser from tenant for life under a power of sale was held bound by the covenants and terms of a lease granted by the tenant for life in execution of a power of leasing (although such lease transgressed the terms of the power) to the same extent that the tenant for life himself would have been bound.

As it is impossible that a settled estate can be enjoyed except by means of the exercise of a power to lease, the Courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life (8 Sim. 158).

Are not "usual powers."

2. Powers of jointuring are not, it seems, usual powers within the meaning of a direction to make a settlement "with all usual powers": for they diminish the estate, and there is no certain rule as to their quantum; the words "usual powers" refer to the usual and necessary powers of management (cf. *Hill* v. *Hill*, 6 Sim. 145).

In marriage settlements, these powers are usually limited to

enabling the husband to jointure a future wife, but in family settlements, and in wills, they extend to enable the successive tenants for life, as they come into possession, to provide for their wives (Davidson, iii. 466, 3rd ed.).

Liberally construed.

3. A power to jointure, although a burden on the estate, is liberally construed in equity, so far as its execution is concerned, inasmuch as the object is one of a class highly favoured by the Court. Thus, equity will aid a defective execution of a power to jointure. In *Coventry* v. *Coventry* (2 P. W. 222), a covenant in marriage articles to convey and appoint estates after the marriage for jointure according to the power of the covenantor or otherwise, was aided as a defective execution. And a covenant to limit a jointure, in execution of a power which is only to be exercised when the donee is in possession, has been aided (*Alford* v. *Alford*, cited 2 P. W. 230).

When exerciseable after marriage or in favour of second wife.

The question whether a particular power can be exercised in favour of a wife already taken, or of a second wife, must depend on the wording of the power in question. In *Re Borrowes* (2 I. R. Eq. 468), there was a devise of land to two brothers successively for life, and power was given to them, when and as they should respectively become seised in possession, by deed or writing "to be made upon or previously to their marriage," to jointure their wives. One of the life tenants married after the date of the will, but before the testator's death in 1834. His execution of the power was held invalid; (and see *Dillon* v. *Dillon* 11 Ir. Eq. R. 423). In *Re Creagh* (25 L. R. Ir. 128), the tenants for life were empowered "at his or their marriage" to charge jointures and portions. This power was held to be exerciseable at any time after marriage. In *Mills* v. *Mills* (8 Ir. Eq. R. 192), marriage articles secured a jointure for the wife and portions for the younger children, and then proceeded to give power to the husband to appoint a jointure to any wife he might marry and portions for younger children. This power was held to be exerciseable only for the benefit of a second wife and her children.

The limits of a power of jointuring are usually clearly defined; the remaindermen are entitled to say that those limits

shall not be exceeded; but within such limits, the Court will give every aid to the jointress.

Not usually restricted to one wife.

It would therefore, it seems, require express words of restriction to make it necessary that a power of jointuring should be exercised *uno flatu:* or that it should be exerciseable in favour of one wife only.

In *Zouch* v. *Woolston* (2 Burr. 1136), the words were that the husband should have power "from time to time during his life, by deed or deeds, writing or writings, to limit all or any part of the estate to any woman or women that shall be his wife or wives, for and during their life or lives;" and it was held that the power might be executed at different times; for the words were applicable to each respective wife, and empowered the husband to make different settlements upon the same wife.

In *Hervey* v. *Hervey* (1 Atk. 561), the power was to settle lands of a certain value for a jointure or provision for such wife during her natural life (2 Burr. 1144). Lord Hardwicke said that it was very plain that it was a power to settle a jointure upon any after wife, and so *toties quoties* upon any subsequent marriage.

In *Maultby* v. *Maultby* (2 Ir. Ch. R. 32), a testator devised estates to his son for life, with remainders over, and empowered him to make a settlement for the use of any wife he might marry. The son executed a settlement upon his first marriage, and purported thereby to reserve to himself power to jointure a second wife. He married again after the death of his first wife, and charged a jointure for the second wife, as if in execution of the power. The attempted reservation of a power in the settlement was clearly invalid, but it was held that he had under the will power to jointure a second wife, although he had exercised his power on his first marriage.

In *Mason* v. *Mason* (5 I. R. Eq. 288), lands were devised to trustees in trust for A. for life, and in case he should think of marrying, the trustees were empowered and directed to settle and secure the lands as a jointure on his wife and to their issue, share and share alike. A. married twice, but the power was not exercised. He died leaving issue of the first marriage and his

widow, but no issue of the second marriage. It was contended that a settlement ought to be prepared as if upon the occasion of the first marriage, where, after providing a jointure for the wife, the property would be limited to the children of the first marriage, and there would be no means of providing a jointure for a future wife. But the Vice-Chancellor thought that if the husband were the donee of the power, he could exercise it on his second marriage, and that it made no difference that there was a direction to the trustees to execute a settlement for the same purpose; (and see *Beran* v. *Beran*, 13 L. R. Ir. 53). *Allanson* v. *Clitherow* (1 Ves. sen. 24), is a peculiar case, in which the object of the power was to make a strict settlement rather than a jointure (Sug. Pow. 701).

Power usually exerciseable during possession.

4. The right to exercise the power is usually made contingent upon possession. It has been before stated (p. 144), that a power to be exercised upon a contingency may be well exercised before the event happens: but (p. 147) that a power which is not to arise until a future event happens cannot be exercised before that event, for until then it has no existence: and if there is no power at all, there can be no execution of it, defective or otherwise. It is perhaps difficult to reconcile the decisions as to jointures with these rules, unless it can be said that in all cases such a power is presently given. Lord Redesdale, in *Shannon* v. *Bradstreet* (1 S. & L. 63), says that in cases without number, upon jointuring powers particularly, it has been determined that a covenant is a sufficient declaration of an intent to execute, *even when made before the power arose*, as where a power is limited to be exercised by tenant for life in possession, and he covenants that when he comes into possession he will execute: in all these cases Courts of equity have relieved.

In *Alford* v. *Alford* (cited 2 P. W. 230; 1 Str. 604), A. settled lands upon himself for life, remainder to his wife for life, remainder to his first and other sons in tail, remainder to B. for life, remainder over; with power to B., *after the death of A. and his wife*, to jointure a wife. B. on the occasion of his marriage in the lifetime of A., covenanted to execute his power when in possession. A. and his wife died without issue, and B. came

into possession, but never settled the estate: it was decreed that the power was well executed.

In *Jackson* v. *Jackson* (4 Bro. C. C. 462), a settlement contained limitations of successive life estates to father and son, with remainders over, and authorized the father and son, *when they should respectively be in actual possession*, to make jointures. The father and son entered into a general covenant (without reciting or referring to the power) that the son should within twelve months make a jointure on a then intended wife. The father died within the twelve months: the son entered and died without making any settlement. The Master of the Rolls held that the power was in the contemplation of the parties at the time of making the articles: that the settled estate was the only estate on which the covenant could attach, and it did attach: and that the persons entitled had a right to call for an execution of the covenant.

Incapacity of covenantor when in possession makes no difference.

And the same principle which gives effect to a covenant as an execution, although the covenantor when he comes into possession forgets or refuses to fulfil his covenant, gives effect to the covenant against a subsequent want of capacity: in both cases effect is given to the instrument without reference to the subsequent want of consent or capacity on the part of the donee of the power. In *Affleck* v. *Affleck* (3 Sm. & G. 394), A., who was entitled to real estate in remainder expectant on the death of B., and was empowered when he should be in possession to limit a jointure, covenanted on his marriage in B.'s lifetime that if he came into possession he would exercise the power. A. became of unsound mind before he came into possession, and continued so down to his death, which happened after the death of B. It was held that the Court was bound to aid the covenantee and enforce the charge against the remainderman.

It is of course clear that, if the donee of the power does not live to come into possession, the contingency on which the power was dependent will not have happened, and equity can give no assistance: and the power cannot be accelerated by collusion between the donee and the owner of the previous life estate (*Truell* v. *Tysson*, 21 B. 441).

Specific performance of covenant to jointure.

If the covenantor after coming into possession refuse to carry out his covenant, a decree for specific performance may be obtained to compel him to execute a deed of appointment in accordance with his covenant; and if he refuse to execute such deed, the Court will declare him a trustee within the Trustee Acts of the estate subject to the power, to the extent necessary to raise the annuity, and will appoint a person to execute the deed of appointment in his place (*Wellesley* v. *Wellesley*, 4 D. M. & G. 537).

Covenant that jointure is of given value.

If a man covenants that the jointure is of given value, his estate must make good any deficiency (*Probert* v. *Morgan*, 1 Atk. 440), unless it be clear that the covenantor intended merely to covenant to make a jointure in accordance with the power, and covenanted by mistake to appoint more than the power authorized (*Lady Londonderry* v. *Wayne*, Ambl. 427); but this can only be where it is clear that a mistake has been made by *all parties* (Sug. Pow. 707).

Recital, when a covenant.

A recital in a deed may amount to a covenant, if it be plain from the whole deed that it was so intended; but the Court is cautious in spelling a covenant out of a recital; because it is not the part of a deed in which covenants are usually expressed (*Lay* v. *Mottram*, 19 C. B. N. S. 479).

In *Borrowes* v. *Borrowes* (6 I. R. Eq. 368), a settlement, to which A. (the father), B. his daughter, and her intended husband were parties, recited that A. agreed to give and appoint to his child B. 3,000*l.*, of which 1,000*l.* was to be paid in cash, and the remainder to be charged on the estates of A., and that the husband had agreed to make certain charges in favour of B. and their children; and that A. had under a power charged his estates with 3,000*l.*, and that it had been agreed that A. should pay 1,000*l.*, part of B.'s portion, to the husband at once, and that A. should appoint 2,000*l.* (the residue of the 3,000*l.*) as a charge on his estates, the sums to be in full for B.'s portion. This appointment was afterwards made; and B. and her husband released A. and his heirs from all claims in respect of other provisions for children. This recital was held not to amount to a personal covenant by A., although it should prove

that the 2,000*l.* was not well charged, by reason of the execution of the power being invalid. And generally as to recitals operating as covenants, see *Holles* v. *Carr* (3 Sw. 638); *Duckett* v. *Gordon* (11 Ir. Ch. R. 181); *Monypenny* v. *Monypenny* (9 H. L. C. 114); *Thompson* v. *Thompson* (6 I. R. Eq. 113, 322); *Weldon* v. *Bradshaw* (7 *ib.* 168); *Dawes* v. *Tredwell* (18 Ch. D. 354); Elphinstone on Deeds, 415.

And if the husband appoints the jointure in consideration of his wife's fortune, no claim can be maintained by him or in his right, while the terms are not fulfilled on his part (*Mitford* v. *Mitford*, 9 Ves. 87).

Appointments of jointures free from taxes.

5. Formerly it was common to give power to appoint lands not exceeding a certain yearly value by way of jointure, but the power in modern practice is in general to appoint a rentcharge or rentcharges not exceeding a certain amount (Davidson, iii. 470). This distinction must be borne in mind in considering from what taxes jointures may be appointed free. In *Hervey* v. *Hervey* (1 Atk. 561), it was considered clear that a power to A. to make a jointure of such of the settled lands as he thought proper, not exceeding 600*l.* per annum, would not authorize the settlement of an annuity clear of taxes; and it was so held in *Lady Londonderry* v. *Wayne* (Ambl. 424).

But it seems the better opinion that, if a yearly amount by way of rentcharge is authorized, an appointment may be made free from participation in the burdens of the land (Davidson, iii. 472 n.).

"Clear value."

Where the power was to appoint any part of the premises, not exceeding a certain clear yearly value, to a wife for her jointure, Lord Hardwicke said that the word "clear" was to be construed as it would be in an agreement between buyer and seller; that is, clear of all outgoings, incumbrances, and extraordinary charges, not according to the custom of the country, as tithes, poor-rates, church-rates, &c., which are natural charges on the tenant. If in the country where the estates lie it had been the custom for the landlord to pay those rates, the jointure ought to be subject to them, for they would in such case only be ordinary charges (*Lord Tyrconnel* v. *Duke of*

Ancaster, Ambl. 240). Such a jointure will be clear of land tax (1 Bro. C. C. 4, n.).

In *Trevor* v. *Trevor* (13 Sim. 108; 1 H. L. C. 239), an estate was by will directed to be settled in strict settlement, and in the settlement was to be contained a power for the tenant for life to jointure "to the extent of one fifth part of the then ordinary annual rental of the estates." It was held that the settlement ought to authorize the tenant for life to charge the estates with a clear yearly rentcharge, not exceeding one fifth of the yearly rent of the estates payable at the time of creating the charge. The House of Lords affirmed the decree without entering into this point at all. See this case observed on by Lord St. Leonards (Prop. H. of L. 489), where he concludes that the settlement only authorized the appointment of a jointure equal to one fifth of the rent received by the landlord, after the deduction of land tax and the like, but that the jointure, when so fixed, remained payable at that sum for the whole life, clear of deduction, obviously because the proper deduction was made once for all when the actual amount was fixed.

"Without any deduction."

The usual form in instruments at the present time is to authorize a rentcharge of the amount specified to be charged "without any deduction."

Succession duty.

These words will exonerate the jointress from succession duty and legacy duty, the effect of the words being to make an additional grant; or rather, it is an integral part of the grant of the rentcharge, conveying to the jointress the right of having any such deduction raised, and imposing on the trustees the obligation of having the rentcharge paid without any such deduction, that deduction being left to be satisfied out of the other rents of the estates which they would have a right to raise, plus the amount necessary to satisfy the rentcharge (*Floyer* v. *Bankes*, 3 D. J. & S. 306; *Peareth* v. *Marriott*, 22 Ch. D. 182; *Re Robins, Nelson* v. *Robins*, 58 L. T. 382).

Income tax.

The cases as to income tax are somewhat conflicting, and are explained by Kay, J., in *Gleadow* v. *Leetham* (22 Ch. D. 269), as falling under two heads: (1) when the annuity or jointure is given first, and is followed by a direction that it shall be free

from all deductions in respect of any taxes; (2) where the annuity or jointure is directed to be paid without any deduction, or free from legacy duty and other deductions. In the first class of cases (of which *Festing* v. *Taylor*, 3 B. & S. 217; *Lord Lovat* v. *Duchess of Leeds*, 2 Dr. & S. 62; 31 L. J. Ch. 503; and *Re Bannerman*, 21 Ch. D. 105, are examples) the word "deductions" was construed by the word "taxes" which was associated with it, and was held to include income tax. In the second class of cases (of which *Lethbridge* v. *Thurlow*, 15 Beav. 334; *Abadam* v. *Abadam*, 33 Beav. 475; and *Sadler* v. *Rickards*, 4 K. & J. 302, are examples) the word deduction had its strict and usual meaning given to it: and, as Lord Hatherley said in *Turner* v. *Mullineux* (1 J. & H. 334), "this Court always holds that income tax is not a deduction."

Cost of exchange.

Where a settlement authorized the grant of a rentcharge "to be tax free and without any deduction, and to be issuing out of and chargeable on lands in Ireland, so that such rentcharge do not exceed the yearly sum of 3,000*l.* of lawful money of Great Britain," it was held that the rentcharge was payable in Ireland in English currency, and that the appointee was not entitled to have the sum transmitted to England free of all charge of conveyance and exchange (*Lansdowne* v. *Lansdowne*, 2 Bligh, 60).

Period for ascertaining the burdens.

6. Where lands of a given value are to be settled, the taxes from which the jointure is to be free are to be ascertained at the time of the execution of the power (*Lord Tyrconnel* v. *Duke of Ancaster*, Ambl. 239; *Trevor* v. *Trevor*, 13 Sim. 136); although Lord Henley held that the death of the husband was the proper period (*Lady Londonderry* v. *Wayne*, Ambl. 427; Sug. Pow. 705; Prop. H. of L. 489).

Jointure must arise *de die in diem*.

7. A power to charge a jointure (which is an estate in lands limited to a wife expectant upon a life estate of her husband) cannot be properly executed by an appointment of a sum to be paid immediately on the appointor's death; the jointure arises out of the rents and profits of the land as they arise *de die in diem*.

But if the donee of the power in exercising it charge a jointure of less amount than that authorized, but direct an

immediate payment of a certain amount, it seems that such immediate payment, if, with the amount of the jointure properly appointed, it do not exceed the limits authorized, may be taken as an appointment of a jointure of a larger sum (*i.e.*, of the amount at once payable and of the jointure) for the first year, and of a smaller sum (*i.e.*, of the jointure only) for the future. Of course, if the amount directed to be immediately paid, when added to the jointure proper, exceed the amount authorized to be charged, the appointment will fail *pro tanto*.

The question as to what would be the effect of the death of the jointress before the first regular day of payment, has never been decided; but by virtue of the Apportionment Acts (4 & 5 Wm. 4, c. 22, and 33 & 34 Vict. c. 35) the jointress would be entitled to a proportionate part of the jointure calculated at the larger amount; and if such larger amount should be less than the amount authorized to be charged, the estate of the jointress would be entitled not merely to an apportioned part of such larger amount, but to an amount equivalent to an apportioned part of the whole amount authorized to be charged, on the ground that the appointor meant her to have so much down, and that his intention ought to be carried out as far as is practicable.

In *Purcell* v. *Purcell* (2 Dru. & War. 217), the power was conferred by will in these words: "I hereby empower my son W. to charge said land with a jointure by deed or will for any wife he may marry." The son purported to exercise the power, and directed the first payment of the rentcharge to be made on the day of his own decease. The Lord Chancellor said: "The party had a general power to jointure, and, within the value of the property, there was no limit to the amount. It is not perhaps a natural construction of this power to say, that the jointure might be made payable instanter upon the death of the donee; but this result might have been indirectly effected, for the appointee, the jointress, having lived beyond the first regular day of payment, there was nothing to have prevented the party from appointing that, on the first regular day of

payment, she should receive double the sum to which she was to be entitled on every subsequent day. I may consider the case just as if he had directed that an amount equal to both the first and second payments should be payable on the first regular day of payment after his decease. If, indeed, the jointress had died before the first day, a question might have arisen, but as the case now comes before me, I do not see why I cannot, in favour of the intention, do that in the manner I have pointed out, which he clearly had the power to accomplish."

Jointure in proportion to wife's fortune.

8. It was formerly not unusual to make the power to jointure in proportion to the amount of fortune brought into the family by the lady. If such be the case, the transaction must be fair: a nominal portion is not sufficient: nor if the husband or his friends advance money to make up the sum, and it is afterwards repaid: nor if the wife's portion is settled to her separate use. The object of making such powers is, that the person may marry providently, and not burden the estate with a jointure for a woman who brings nothing. It is not necessary that the portion should be paid to and actually spent by the husband; where the portion is settled in a proper and reasonable manner for the benefit of the family in a fair way of contracting, that is not within the reason of the cases on fraud and collusion (*Lord Tyrconnel* v. *Duke of Ancaster*, Ambl. 238).

A power to jointure to such amount as A. shall deem expedient in proportion to the portion he may receive with his wife, authorizes a jointure, although the wife brings no portion (*Re Molton*, 2 Ir. C. L. R. 634). If the power expresses no limit, it is difficult to say that the Court can assign any limit; and even if the words be "reasonable amount," the reasonableness is left to the appointor (see Sug. Pow. 437, and the comments there on *Lord Tankerville* v. *Coke*, Mos. 146; and *Edgeworth* v. *Edgeworth*, Beat. 328).

Dower.

9. An appointment under a power to appoint a provision for or in the name of jointure will not bar dower, unless the appointor so declare; and it seems clear that the appointor may lawfully make such a declaration (Sug. Pow. 707; and as to

dower, see now 3 & 4 Wm. 4, c. 105). It is well settled that adultery does not cause a husband to forfeit his estate by curtesy, nor the wife to forfeit her jointure (*Sidney* v. *Sidney*, 3 P. W. 269; *Re Walker*, Ll. & G. at p. 326; *Fearon* v. *Lord Aylesford*, 14 Q. B. D. 792). But the power of jointuring may be so worded as to render it necessary that the woman claiming it should answer the description of wife at the husband's death (cf. *Bullmore* v. *Wynter*, 22 Ch. D. 619; *Re Morrieson*, 40 Ch. D. 30).

CHAPTER XV.

POWERS OF CHARGING.

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Not usual power.

1. It has been held that powers of this nature are not usual powers within the meaning of a direction to make a settlement "with all usual powers, including a power to jointure" (*Higginson* v. *Barneby*, 2 S. & S. 516), "because the effect of such a power would be to diminish the estate, which was expressly limited in strict settlement, and because there was no certain rule as to the quantum of such portions by which the Court could be guided." The Vice-Chancellor considered that the words referred to the usual and necessary powers of management. It is to be observed that the express mention of a power to jointure to some extent negatived the intention of inserting any other similar power; (cf. *Pearse* v. *Baron*, Jac. 158). But it may be doubted whether any general rule can be laid down; (see *Sackville-West* v. *Lord Holmesdale*, L. R. 4 H. L. 543, 577).

Covenant to settle on issue of marriage.

The question necessarily arises on executory instruments, and turns on the construction of the particular document. But a mere covenant in marriage articles to settle an estate, after payment of an annuity to the intended wife, upon the covenantor's issue by such wife, excludes the creation by the covenantor of charges in favour of younger children. Such a covenant can

only be performed in one of two ways, either by limiting the estate to the first and other sons of the settlor successively, according to seniority in tail, with remainder to the daughters as tenants in common in tail, with cross-remainders between them; or by limiting the estate to all the children, male and female alike, as tenants in common in tail, with cross-remainders between them. The former is the established form in the absence of express provision to the contrary. But neither of such limitations would support a charge in favour of younger children, it being well settled that when there is a contract merely to settle upon the eldest son as heir in tail, there is no power in the Court to award portions to younger children, unless there is in the articles some provision for that purpose, or some reference to some other document which can enable the Court to ascertain what the amount of such provision ought to be (*Grier* v. *Grier*, L. R. 5 H. L. 688, 708; and see *Bedford* v. *Abercorn*, 1 M. & C. 312; *Savage* v. *Carroll*, 1 B. & B. 265, 276). And as children or issue in a marriage settlement mean *primâ facie* the children of that particular marriage (*Dafforne* v. *Goodman*, 2 Vern. 362), no power of charging in favour of the children of a second marriage could properly be inserted. Thus, in *Hart* v. *Middlehurst* (3 Atk. 371), ante-nuptial articles contained a covenant to convey lands to trustees in trust for the settlor for life, with remainder to the wife for life, with remainder "to the issue of this match, in such sort, manner, and form, and subject to such charges for younger children," as the settlor should appoint: and it was held that the only child of the marriage (a daughter) was entitled to have a settlement of the lands made on her as tenant in tail to the exclusion of the son of the settlor by a second marriage: and the argument that the settlor might limit the estate to the son of the second marriage, leaving a charge for the benefit of the daughter of the first marriage, was rejected; and see *Re Woodleys*, 29 L. R. Ir. 304.

On issue of second marriage.

In *Mayn* v. *Mayn* (5 Eq. 150), an executory deed provided for the settlement of a sum of money on the wife and children of the settlor, "with all the powers for changing the security, and for maintenance, and other powers and trusts which are

Power of advancement.

usually inserted in a money settlement of the like nature;" and it was held by V.-C. Wood that a power of advancement was proper to be inserted (see p. 154).

Vesting of portions.

In *Lord Holmesdale* v. *West* (12 Eq. 280), it was held that in the settlement, to be made in accordance with the directions given by the House of Lords in *Sackville-West* v. *Lord Holmesdale* (L. R. 4 H. L. 543), no provision ought to be inserted postponing the vesting of the portions until the death of the person creating them.

Indefinite charge on rents and profits.

2. A power of charging land will authorize a charge upon any portion thereof, and a power of charging indefinitely may be executed by a sale so as to bind the whole inheritance (*Long* v. *Long*, 5 Ves. 445). Equity will at any rate decree a sale to raise the charge (Sug. Pow. 429). And an unlimited indefinite charge upon rents and profits is a charge upon the *corpus*, just as an unlimited indefinite gift of rents and profits is a gift of the *corpus* (*Phillips* v. *Gutteridge*, 3 D. J. & S. 332; and see *Pearson* v. *Helliwell*, 18 Eq. 411).

Authorizes sale.

Such a charge authorizes a sale or mortgage for the purpose of raising the portions, and also the incidental costs (*Armstrong* v. *Armstrong*, 18 Eq. 541; *Michell* v. *Michell*, 4 Beav. 549). Such costs are payable by the estate, and not out of the portions (*ibid.*); but such costs do not include the costs occasioned by dealings with the charges (*Stewart* v. *Marquis of Donegal*, 2 Jo. & L. 636). In general where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipt of the rents and profits when they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by a liberal construction of these words, taken them to amount to a direction to sell (*Green* v. *Belcher*, 1 Atk. 505; *Metcalfe* v. *Hutchinson*, 1 Ch. D. 591).

The expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage (*Bootle* v. *Blundell*, 1 Mer. 193, 233). In this case Lord Eldon says: "I have understood it to be a settled rule that when a term is created for the purpose

of raising money out of the rents and profits, if the trusts of the will require that a gross sum should be raised, the expression 'rents and profits' will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage." Lord Thurlow says the same in *Shrewsbury* v. *Shrewsbury* (1 Ves. jun. 234); and Sir Thomas Plumer in *Allan* v. *Backhouse* (2 V. & B. 75), where all the earlier cases are collected in the judgment.

Where there is an alternative direction, the most reasonable construction is that annual charges should be discharged out of annual rents and profits, and that gross sums should be raised by sale or mortgage (2 Jarm. 4th ed. 615; 3 Dav. Conv. 3rd ed. 449).

Where charges are to be raised by sale or mortgage, the Court, in determining by which mode the money shall be raised, will have regard to the wishes of those immediately interested rather than of those whose interests are more remote (*Metcalfe* v. *Hutchinson*, 1 Ch. D. 591).

If the person who creates the charge express an intention that it shall affect the rents and profits as they arise only, effect must be given to such intention (*Foster* v. *Smith*, 1 Ph. 629; *Earle* v. *Bellingham*, 24 B. 445; *Wilson* v. *Halliley*, 1 R. & M. 590; *Re Green*, 40 Ch. D. 610).

And there may be cases where the *corpus* is not charged, but there is a continuing charge on the rents and profits (*Booth* v. *Coulton*, 5 Ch. 684; and see *Taylor* v. *Taylor*, 17 Eq. 324; *Michell* v. *Wilton*, 20 Eq. 269; Hayes and Jarman, Concise Prec. of Wills, 9th ed. 169).

It is, of course, open to a settlor or testator to direct the mode in which portions shall be raised; and where a particular method of raising is directed, it implies that they shall not be raised in any other way (*Ivy* v. *Gilbert*, 2 P. W. 13, 18). Thus, in *Bennett* v. *Wyndham* (23 Beav. 521), there was a trust out of the rents, issues, and profits, or by such other ways and means, except a sale or sales, to raise money to pay off charges: and it was held that the money could not be raised either by sale or mortgage, or by lease on fines, but that the other ways and

means referred to meant by timber or mines. Where the ordinary profits of a term are not sufficient to raise a portion, timber may be felled, or a mine worked (*Offley* v. *Offley*, Prec. Ch. 26). And as to the duties and powers of trustees for raising charges by sale of timber, see *Marker* v. *Kekewich* (8 Ha. 291); *Kekewich* v. *Marker* (3 Mac. & G. 311); and *Re Marquis of Bute* (27 Ch. D. 196).

When portions to be raised.

3. The question as to the time when portions become payable and are to be raised depends "on the particular penning of the trust" (*Hebblethwaite* v. *Cartwright*, Ca. t. Talbot, 32); and it is therefore difficult to state any general rule. It is, however, settled that:—

> If the interests are vested, or the contingencies have happened on which the portions are to be paid, and the portions are required, they must be raised, although the only means of raising them may be by sale or mortgage of a reversionary term (*Massy* v. *Lloyd*, 10 H. L. C. 248; *Codrington* v. *Lord Foley*, 6 Ves. 364, 379).

"The intention is to govern, and when the period has arrived at which portions are clearly directed to be paid, you must raise them, although the act of doing so involves a considerable sacrifice and waste of property" (10 H. L. C. 263; and see *Henty* v. *Wrey*, 21 Ch. D. 332, 359).

Portions secured on reversionary term.

So, too, if there be a limitation to a parent for life, with a term to raise portions for children at twenty-one or marriage, to take effect according to his appointment, *primâ facie* the intention is that the donee should be able to appoint that the portion should be immediately raised: and this intention will not be controlled by the fact that the term for securing the portions is reversionary, nor that the settlement contains a maintenance clause (*Smyth* v. *Foley*, 3 Y. & C. Ex. 142; *Michell* v. *Michell*, 4 B. 549).

In *Keily* v. *Keily* (4 Dr. & War. 38), on the marriage of B.,

lands of A., his father, were vested in trustees in trust for A. during B.'s life, and subject thereto to secure a jointure and to raise 4,000*l.* for younger children, to be divided according to B.'s appointment, and in default equally, and to be payable at twenty-one or marriage, "if such respective times of payment should happen after the death of B., but if before, then within three calendar months after the death of B., and not before or sooner, unless with the consent of A. if living, and if dead, of B." B., after A.'s death, appointed in favour of a younger child who had attained twenty-one, and directed such portion to be raised and paid at once. This appointment was held to be authorized by the settlement.

"The rule upon the whole depends upon this: whether it was the intention of the parties to the instrument, attending to the whole of it, that the portion should or should not be raised in this manner: taking it *primâ facie* to be the intention upon the general rule, if there is nothing more than a limitation to the parent for life, with a term to raise portions at the age of twenty-one or marriage, if there is nothing more and the interests are vested, and the contingencies have happened on which the portions are to be paid, the interest is to be paid, and the portions must be raised in the only manner in which they can be raised; that is by mortgage or sale of the reversionary term" (*Codrington* v. *Lord Foley*, 6 Ves. 364, 380; *Hall* v. *Carter*, 2 Atk. 356; *Wynter* v. *Bold*, 1 S. & S. 507; *Okeden* v. *Okeden*, 1 Atk. 550; *Whaley* v. *Morgan*, 2 Dr. & Wal. 330; *Evelyn* v. *Evelyn*, 2 P. W. 659).

Power of revocation suspends portions.

And portions do not become *payable* although actually vested and due under a trust to raise portions, so long as there is in existence a general power of revoking the whole settlement (*Reresby* v. *Newland*, 2 P. W. 93). "With respect to the power of revocation, it is still a subsisting power, and consequently suspends and prevents the portions from being as yet payable, because the father, by consent of the trustees, may yet revoke: he may revoke at any time before the portion is raised and paid." The decision was affirmed in D. P., 6 B. P. C. 75, and is cited with approval by Lord St. Leonards (Pow. 454).

Is the whole sum for portions raiseable as soon as any part becomes payable?

4. There has been some difference of opinion on the question whether the whole sum raiseable for the portions of younger children should be raised as soon as any of the portionists have become entitled to payment, although others have not yet acquired vested interests.

In *Gillibrand* v. *Goold* (5 Sim. 149), Shadwell, V.-C., held that the whole sum ought to be raised immediately, and he disposed of the objection, that the younger children whose shares were not yet payable might lose by a fall of consols, by saying that an investment in consols was equivalent to payment. *Sed qu.;* for a creditor whose claim is not payable cannot be bound by any investment in consols that his debtor may choose to make in order to satisfy the debt when due.

In *Leech* v. *Leech* (2 Dr. & War. 568), the trust was to raise 4,000*l.* for the portions of younger children, to be paid at twenty-one or marriage. Sugden, L. C., held that as some of the children had attained twenty-one, the whole sum was to be raised at once, and that the shares of infants were to be invested until they attained twenty-one, and the dividends thereon applied for their maintenance in lieu of the maintenance to which they were entitled under the trusts of the term.

In *Pearcth* v. *Greenwood* (28 W. R. 417), lands were limited to trustees for a term of years in trust to raise portions for younger children, to be vested at twenty-one or marriage, with a proviso that no sale or disposition should be made until some one of the portions should be actually payable. It was held that the whole sum was raiseable when the eldest of the younger children attained twenty-one. But here the proviso rendered it plain that this was the intention; and the Court, moreover, provided for possible depreciation in the value of the consols to be purchased for the minors by carrying over a sum not merely sufficient to pay them, but also to allow a margin for depreciation. This seems unobjectionable; and the practical convenience to the estate of the two former decisions is obvious: but it is by no means clear that the strict rights of the infants were not unduly postponed to the interest of the owner of the estate charged. And the contrary has been held in *Hays* v.

Bailey (cited 2 Dr. & War. 576), by Sir William Grant; and in *Sheppard* v. *Wilson* (4 Ha. 392), Sir J. Wigram at first refused to allow the owner of the estate charged to have the portions raised before any of them became payable for the purpose of clearing the estate; and subsequently, when two of the younger children became entitled to vested interests, and applied to have the whole sum raised, the Vice-Chancellor refused to direct a larger sum to be raised than was required to satisfy the portions which were actually due. And in *Edgeworth* v. *Edgeworth* (Beat. 328), it was said that a provision for maintenance and education during minority negatived the raising of portions during infancy, because the interest of the portions, if raised, would fulfil these purposes and render the express provision unnecessary; (see, too, *Wynter* v. *Bold*, 1 S. & S. 507).

Apportionment of charges for portionist.

A portionist entitled to a portion of an entire charge, and also entitled to a portion of the estate subject to the charge, is not entitled as a matter of right to have the charge apportioned to the various shares of the estate in order to clear his share (*Otway-Cave* v. *Otway*, 2 Eq. 725); but the Vice-Chancellor in that case gave the plaintiff an option of bringing a scheme into chambers for advancing the money due in respect of his share of the estate and so releasing it.

Power to charge authorizes charge of principal and interest.

5. A power to charge an estate with a gross sum implies a power to charge it with interest (*Boycot* v. *Cotton*, 1 Atk. 555; *Roe* v. *Pogson*, 2 Madd. 457; *Lewis* v. *Freke*, 2 Ves. jun. 507).

In *Simpson* v. *O'Sullivan* (3 Dr. & War. 446), the power was to raise "by deed, mortgage, or any other writing;" in this case there could be no doubt, for a mortgage necessarily supposes the security of a principal sum with interest. And if the party entitled to charge, or to give interest from the time the fund is to be productive, fixes the rate, the Court cannot control his discretion, either by diminishing it, if he gives more than 4*l.*

per cent., or by increasing it if he give less than legal interest (*Lewis* v. *Freke*, 2 Ves. jun. 507). This, however, was qualified by the proviso that the rate of interest fixed by the appointor did not exceed legal interest. And Lord St. Leonards on this states (Pow. 697), that, "if no rate is fixed, the Court will give 4*l.* per cent., and the old rule as to the rate of interest would probably still prevail, notwithstanding that the Statutes of Usury have been repealed." It is, however, open to question whether an appointor, who has not a mere power of apportioning a charge, but the right to direct whether it shall be raised at all or not, can appoint more than 4*l.* per cent. interest. If he can exceed 4*l.* per cent., there is no reason why he should not appoint 10*l.* or 100*l.* per cent.; and the judgment of Baggallay, L. J., in *Balfour* v. *Cooper* (23 Ch. D. 472), would seem to give some support to this. The decision in that case, however, was merely that the appointor had no right to fix the rate of interest, when his power was limited to an apportionment of the charge, but that in such a case the rate was that allowed by the Court. This rate is in England 4*l.* per cent., and in Ireland 5*l.* per cent. (*ibid.*; and see *Young* v. *Lord Waterpark*, 13 Sim. 199; *Leslie* v. *Leslie*, Ll. & G. 1; *Purcell* v. *Purcell*, 2 Dr. & War. 217; *Simpson* v. *O'Sullivan*, 3 Dr. & War. 446).

Interest to be paid annually.

The interest ought not to be directed to accumulate, but should be paid annually; for when it is given at the rate of 5*l.* per cent. the natural construction is, that it should be paid annually and become due every day, for it is given as a recompense in the meantime, till the principal is due (*Boycot* v. *Cotton*, 1 Atk. 555).

And the person who has sustained a child, in whose favour a charge has been made, will be entitled to the interest, for it is given for maintenance (*ibid.* 556).

If the terms of the power do not admit of the raising of the principal in the lifetime of the tenant of the particular estate, interest cannot be due until after his death; for interest is only in lieu of non-payment of principal (*Churchman* v. *Harvey*, Ambl. 342; *Reynolds* v. *Meyrick*, 1 Ed. 48; *Massy* v. *Lloyd*, 10 H. L. C. 248; *Lyddon* v. *Lyddon*, 14 Ves. 558).

And it seems that if the charge is to be raised out of *annual* rents and profits, it will not carry interest (*Evelyn* v. *Evelyn*, 2 P. W. 666). Charge raiseable out of annual rents.

6. The tenant for life is bound to keep down the interest on charges upon the estate; and that, too, although he has also an absolute power of appointment (*Whitbread* v. *Smith*, 3 D. M. & G. 741; *Marshall* v. *Crowther*, 2 Ch. D. 199). Tenant for life must keep down interest.

If he fails to do so, and a receiver is appointed, he will have to bear the costs of such receiver (*Shore* v. *Shore*, 28 L. J. Ch. 940; 4 Drew. 501).

But he is not bound to defray the arrears of interest which have accrued during the lifetime of a preceding tenant for life; it is the duty of the reversioner, as much as of the tenant for life in remainder, to see that the tenant for life in possession pays the interest (*Caulfield* v. *Macguire*, 2 J. & L. 160; *Sharshaw* v. *Gibbs*, Kay, 333). If, therefore, a subsequent tenant for life is compelled to pay arrears of interest upon a charge affecting the inheritance which had accrued during a prior life estate, he is entitled to repayment of that sum out of the inheritance (*Kirwan* v. *Kennedy*, 4 I. R. Eq. 499). But where the tenant for life overpaid interest upon a charge by mistake, the Court would not allow him to be repaid out of the inheritance, although the overpayment was made by a receiver appointed by the Court (*ibid.*). But every tenant for life is liable for his own time, and, in order to liquidate any arrears that may accrue during his own time, he must furnish all the rents, if necessary, during the whole of his life (Kay, 333).

In *Howlin* v. *Sheppard* (6 I. R. Eq. 38, 253), a remainderman, on coming into possession, paid out of his own pocket interest which had accrued during the preceding life estate on charges affecting the inheritance. His executor was held entitled, as against the executor of the tenant for life, not only to be recouped out of, but to the whole of the accumulations of, a

fund in Court, the produce of rents of the life estate brought into Court in 1815 by a receiver appointed in an incumbrancer's suit against the tenant for life. And it was further held that the Statute of Limitations had no application to the fund which had remained in Court from 1815 to 1870, and that the remaindermen had a specific lien on all that remained of or represented the estate for life. "I take it to be clear that the obligation of the tenant for life is an equity arising under the settlement, independently of contract, and that it attaches as between the parties so as to enable this Court at any time while the life estate has not been received, either as to past or future rents, to attach these rents or the produce of the life interest; and to apply it precisely in the manner in which the tenant for life ought to have applied it, in payment of incumbrances which he was bound to pay" (*per* Lord St. Leonards in *Coote* v. *O'Reilly*, 1 Jo. & L. 455, 461). In that case the tenant for life had become bankrupt, and the question arose with reference to a sum representing the accumulation of dividends on a fund in Court. And in *Waring* v. *Coventry* (2 M. & K. 406), also, the tenant for life had become bankrupt. But Lord St. Leonards' expression appears to be general. However, in *Scholefield* v. *Lockwood* (4 D. J. & S. 22, at p. 31), Lord Westbury says, "A tenant for life has all his lifetime to pay off the arrears of the interest, and he cannot be charged with neglect of duty; neither does any right arise to the remainderman until the death or insolvency of the tenant for life." But it is submitted that this was not intended to lay down any general proposition of law, but was directed to the question then before the Court, namely, whether there was any income in existence as a separate investment at the date of the claimant's judgment, so as to put him in the position of a specific mortgagee or assignee thereof; and the Lord Chancellor merely intended to say that if there had been any such investment, the tenant for life would have made a good title thereto, notwithstanding the existence of arrears of charges; but that as regarded all other income the claimant was in no better position than the tenant for life. And this would accord with statements of the law by other judges. Thus, in *Makings* v. *Makings* (1 D. F. &

J. 358), Campbell, L. C., says, "Where there is a charge upon the inheritance, the remainderman may file a bill to compel the tenant for life to keep down the interest as far as the rents and profits of the estate will go." The observation was directed to an argument by the remainderman that the owner of the charge had been guilty of laches in not enforcing his charge; and in that case the tenant for life was living and not insolvent; and the speech of Lord Cranworth in *Lord Kensington* v. *Bouverie* (7 H. L. C. at p. 586) is to the same effect. "What the remainderman is interested in is, to take care that the interest is not allowed to fall into arrear, for then whatever rents may have been received by the tenant for life, however sufficient may have been their amount, the remainderman may become liable to satisfy the arrears. To prevent that injustice, he may in a proper case obtain a receiver at the expense of the estate." And Lord Romilly in the same case (19 Beav. at p. 54), says, "If the tenant for life had not kept down the interest, the remainderman might in his lifetime have compelled him so to do, or might have obtained a receiver to take possession of, and to apply the rents of the estate for that purpose." And, notwithstanding a dictum to the contrary by Lord Romilly (19 Beav. at p. 54), which appears to have been misreported (6 Ir. Ch. R. 156), the estate of a deceased tenant for life who has received the rents and not kept down the interest on charges is liable, to the extent of the rents received, to recoup the inheritance or the next tenant for life (*Baldwin* v. *Baldwin*, 4 Ir. Ch. R. 501; 6 *ibid.* 156; *Re Whyte*, 7 *ibid.* 61, n.; *Re Gore*, 9 I. R. Eq. 83; *Re Fitzgerald*, 1 I. R. Eq. 453); but the obligation on the tenant for life exists only as between himself and the remainderman, and is not a personal obligation which the incumbrancer can enforce against him (*Re Morley*, 8 Eq. 594).

Tenant for life paying off charge.

A tenant for life, who pays off a charge, is in general entitled to be a creditor for the amount he has paid, although he has taken no assignment of the charge (*Jones* v. *Morgan*, 1 Bro. C. C. 206; and see *Re Pride*, 1891, 2 Ch. 135). "I take it to be clear law, resting on *Jones* v. *Morgan* (*ubi supra*), *Shrewsbury* v.

Shrewsbury (1 Ves. jun. 227), and *Redington* v. *Redington* (1 B. & B. 131)—the principles of which cases appear to be supported by a long line of subsequent authorities—that a tenant for life, when he pays off charges affecting the inheritance, is under no obligation to do anything, to say anything, or to preserve evidence of anything beyond the fact of the payment of the charge, to entitle him to keep it alive and raise it for the benefit of his personal estate" (*per* Chatterton, V.-C., in *Lindsay* v. *Lord Wicklow*, 7 I. R. Eq. at p. 204). And charges affecting the inheritance include succession duty, if paid on the whole corpus (*Cuddon* v. *Cuddon*, 4 Ch. D. 583); although a tenant for life is of course bound to pay the duty on his own succession, including the costs of rendering the necessary accounts (*Earl Cowley* v. *Wellesley*, 1 Eq. 656).

Further, if a tenant for life with power of charging makes a charge, his general personal estate will not be liable to exonerate the land, and if he pays it off he becomes an incumbrancer on the estate. Thus, if there be tenant for life with power of charging, with remainder to trustees to preserve contingent remainders, with other remainders over and the reversion to himself; if he makes a mortgage, and afterwards pays it off, he is himself an incumbrancer on the estate, even without taking an assignment (*Re Digby*, Jac. 235; *Jenkinson* v. *Harcourt*, Kay, 688).

Paying interest in excess of income.

But a tenant for life who pays interest in excess of the rents and profits of the estate cannot make himself an incumbrancer on the estate for this excess in his payments, if he has not given to the remainderman any intimation of the insufficiency of the rents and profits, and of his intention to charge the excess of his payments on the inheritance. Under such circumstances, there is a presumption of the sufficiency of the rents and profits, and the personal representatives of the tenant for life cannot be allowed to rebut that presumption (*Lord Kensington* v. *Bouverie*, 19 B. 39; revd. 7 D. M. & G. 134; but affirmed by three Lords to two, 7 H. L. C. 557). This decision rested on two grounds: first, that under the circumstances the sufficiency of the income

to pay the charges was to be presumed; secondly, that there was evidence of the intention of the tenant for life to take the whole burden on himself (Ir. R. 4 Eq. 503).

It seems, therefore, that it would need an express declaration of intention and notice to the remaindermen to enable the tenant for life to claim successfully any sum he may have paid in excess of the rents and profits on account of interest. But if such a charge is established, the account to be taken would extend over the whole period during which the tenant for life had been in possession; no Statute of Limitations would apply (7 D. M. & G. 157; *Burrell* v. *Lord Egremont*, 7 B. 205); but it seems that the tenant for life would not be regarded as mortgagee in possession, so as to compel him to account on that footing for the rents which, but for his own wilful default, he might have received (7 D. M. & G. 156). Extent of account.

It is clear, however, that if the rents are insufficient and the tenant for life applies the rents so far as they will go during his lifetime, but does not pay the deficiency, the remainderman cannot after his death redeem, except on payment of that deficiency, or so much thereof as can be claimed, having regard to the Statute of Limitations.

7. Although referential trusts and powers are not, as a general rule, to be read as multiplying charges (*Hindle* v. *Taylor*, 5 D. M. & G. 577; *Baskett* v. *Lodge*, 23 B. 138), this does not apply where the estate on which the incumbrances are charged is increased proportionately. Powers to charge created by reference.

In *Cooper* v. *Macdonald* (16 Eq. 258), a testator made a series of specific devises on trust for each of his children for life, with power for such child to appoint to his widow or her surviving husband an annuity not exceeding one-third of the income of the property specifically devised to him or her; he gave his residuary estate upon and for the same trusts and purposes, and with the same or the like powers, in favour of all his children, share and share alike, and their issue, as should correspond with those thereinbefore expressed and declared concerning the estates specifically devised. The power was to appoint an annuity not exceeding a certain proportion of the income of the property

charged therewith. The testator gave other property and subjected it to the same powers; but the proportion still held; the intention was considered to be that the power was applicable to the added, as much as to the original, property. But it would have been otherwise if the annuity had been of a specific amount. So, too, if a power of charging has been exercised, and afterwards estates are settled to the same uses as the property subject to the power, such estates are not subject to the charge (*Re Berners*, 41 W. R. 188).

And a power of charging, which is given to A. by reference to another power given to B., will be free from all contingencies which are personal to B.; if this were not so, A.'s power might very probably be one that would evanesce altogether (*Harrington* v. *Harrington*, L. R. 3 H. L. 295).

Generality of charging power not to be limited against intention.

A power to charge, without regard to any events which may happen, except only the event of certain numbers of children coming into existence, when once it has been called into existence by the birth of children, cannot be limited, controlled, or questioned in any degree on the ground that under different states of circumstances different results would be arrived at; not even by the extreme case of so many children being born as to make the charges so numerous as to eat up all the estate (*Knapp* v. *Knapp*, 12 Eq. 238).

Lapse of charges created under powers.

8. If a charge be created under a power, whether with or without interest, and the donee dies before the age at which it becomes payable, the charge will sink into the estate (1 Atk. 555); so, if a testator executes a power of charging by will, and the donee dies before the will takes effect, the charge will lapse for the benefit of the estate. If, however, the charge be called into existence, and the intention be clear that it is to be a charge at all events, and the intention that the donee should take is merely secondary, then the charge will remain for the benefit of the next of kin or residuary legatee (*Fosberry* v. *Smith*, 5 Ir. Ch. R. 321).

The following propositions are stated by Lindley, L. J., in *Henty* v. *Wrey* (21 Ch. D. at p. 359), as the result of the authorities:—(1) Powers to appoint portions charged on land

ought, if the language is doubtful, to be construed so as not to authorize appointments vesting these portions in the appointees before they want them, that is, before they attain twenty-one or (if daughters) marry. (2) When the language of the power is clear and unambiguous, effect must be given to it. (3) When upon the true construction of the power and the appointment the portion has not vested in the lifetime of the appointee, the portion is not raiseable, but sinks into the inheritance. (4) When upon the true construction of both instruments the portion has vested in the appointee, the portion is raiseable, even although the appointee dies under twenty-one, or (if a daughter) unmarried.

In *Simmons* v. *Pitt* (8 Ch. 978), a testator having a general power to charge real estates by deed, exercised his power by charging them with 6,000*l.* and interest, to be paid after the deaths of himself and his wife to such persons as he should by will appoint. The trusts directed by his will with regard to this sum were void under the Thellusson Act. This charge was regarded as personalty, and formed part of the testator's residuary estate, and went to the next of kin. The charge was disposed of as personal estate, and was personal estate before it was appointed.

If the power were limited, the donee could not of course by his will call the charge into existence so as to keep it alive, notwithstanding the death in his lifetime of all the objects of the power.

And as to the doctrine of the Court that portions, although in a sense vested, shall not be raised, unless they are actually required, see *Davies* v. *Huguenin* (1 H. & M. 730); *Remnant* v. *Hood* (2 D. F. & J. 396); and as to double portions, see *Chichester* v. *Coventry* (L. R. 2 H. L. 71); *MacCarogher* v. *Whieldon* (3 Eq. 236); *Dawson* v. *Dawson* (4 Eq. 504); *Stevenson* v. *Masson* (17 Eq. 78).

CHAPTER XVI.

POWERS OF SALE, EXCHANGE, ETC.

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Are usual powers.

1. Powers of leasing, of sale and exchange, and, where there is any joint property, or there are any mines or any land fit for building purposes, powers of partition, of leasing mines, and of granting building leases, are powers for the general management and better enjoyment of the estates, and such powers are beneficial to all parties (*Hill* v. *Hill*, 6 Sim. 145). Powers of sale are therefore "usual powers" within the meaning of an agreement to make a settlement containing all usual powers. In *Duke of Bedford* v. *Marquis of Abercorn* (1 My. & C. 312), it was provided by ante-nuptial marriage articles that the settlement (which was to relate to lands in Ireland) should contain all the covenants, provisions, and conditions usually contained in marriage settlements in England. This authorized the insertion of a power of sale and exchange, and the Lord Chancellor saw no reason for confining it to lands in Ireland, but thought that it might very well extend to lands in England; (and see *Peake* v. *Penlington*, 2 V. & B. 311).

Where no directions are given.

If a testator simply directs a settlement, but says nothing as to the powers to be contained therein, it seems the better opinion

that he must have intended all the usual powers of leasing, sale, and exchange, and for the appointment of new trustees, together with a receipt clause, to be inserted. It was so held by Lord Romilly in *Turner* v. *Sargent* (17 B. 515), and by Fry, J., in *Wise* v. *Piper* (13 Ch. D. 848). But in *Wheate* v. *Hall* (17 Ves. 80) (which was not cited in *Turner* v. *Sargent*), Sir Wm. Grant refused to compel a purchaser to take a title depending on the execution of a power of sale, which had been inserted in a settlement made under the decree of the Court, in a suit to carry into execution the trusts of a will. The will merely directed a settlement so as to secure the estate to certain persons in succession. The Master of the Rolls thought that no great stress could be laid on the direction to secure the estate to the successive devisees, as indicating an intention to exclude a power of sale: but in the absence of any expression from which the intention to include such power could be inferred, he was not aware that it was ever decided that the introduction of such a power under such circumstances was of course: nor had he learnt that it was the practice to insert a power of sale in executing such a trust, where the will was entirely silent.

Where some powers are directed.

It has been held that where some powers (not including a power of sale) are expressed, a power of sale cannot be implied. In *Brewster* v. *Angell* (1 J. & W. 625), there was a direction to insert all proper powers and authorities for making leases and otherwise according to circumstances, to and for the tenants for life, to be exercised by them at such times as they should by law be qualified to do so, and the same powers and authorities to be exercised on their behalf by A. and B., their heirs and successors, whenever such tenants for life should be disabled or disqualified, &c. This was held not to authorize the insertion of a power of sale, whether exerciseable by the trustees or by the tenant for life (*Horne* v. *Barton*, Jac. 437).

But in *Tasker* v. *Small* (6 Sim. 625; 3 M. & C. 63), marriage articles recited that it had been agreed that estates of which the husband was tenant in tail, should, subject to raising 15,000*l.* *by mortgage or otherwise* for the husband's use, be settled as therein expressed; and the husband covenanted to settle accord-

ingly, subject to the raising of the said sum, by mortgage, annuity, or otherwise, and to any deeds for securing the repayment thereof and interest; this was held to authorize a sale to raise the 15,000*l.*

Implied authority to insert.

And the insertion of a power of sale may be authorized by necessary inference.

In *Williams* v. *Carter* (Sug. Pow. 945, 839), money was vested in trustees on the trusts of a marriage settlement, and the husband covenanted to settle after-acquired property of his wife, whether real or personal, on the trusts and subject to the powers of the settlement. The settlement contained the ordinary power to vary investments. Real estate subsequently became subject to the covenant, and it was held that a power of sale should be inserted in the settlement made thereof; (and see *Scott* v. *Steward*, 27 B. 367; *Elton* v. *Elton*, 27 B. 634).

In *Tait* v. *Lathbury* (1 Eq. 174), a settlement of personalty contained a power of sale of the trust funds, and of investment of the proceeds in realty, which was to be conveyed to the use of the trustees upon such trusts as would best correspond with the then subsisting trusts thereinbefore declared, and such real estate, when so purchased, was to be considered as personal estate for the purposes of the settlement and go accordingly. There was no express power of sale over the real estate to be so purchased, and no power to give receipts. It was held that the trustees were intended to have both these powers.

Power to give receipts.

In *Tait* v. *Lathbury* and in *Turner* v. *Sargent* (*ante*, p. 545), it was held that not merely was a power of sale to be inserted, but a power to give receipts also. In *Cox* v. *Cox* (1 K. & J. 251), a testatrix declared that every tenant for life or in tail under her will should have such and the like powers of leasing, selling, and exchanging any part of her estate as were by her father's will given to the tenants for life or in tail under his will or to the trustees thereof. It appeared that her father's will did not give the tenants for life or in tail any powers, but gave the trustees full power to sell and exchange and to give receipts. It was held that the tenants for life and in tail under the testatrix's will had power to sell, but, under the circum-

stances of the case, had not power to give receipts. The V.-C. said that this power of giving receipts was a power separate from powers of sale, and by no means inserted as of course in legal instruments; it was often excluded, and, where excluded, it had never, except under very special circumstances, been held to be capable of being implied. The difficulties which would arise in exercising such a power of sale, might be met by paying the money into Court under the Trustee Relief Act (10 & 11 Vict. c. 96). By 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 29, powers to give receipts were conferred on trustees. And now, by the Conveyancing and Law of Property Act, 1881, s. 36, it is enacted that the receipts in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof. This section applies to trusts created either before or after the 1st day of January, 1882. And see S. L. Act, 1882, s. 40, *post*, p. 577.

22 & 23 Vict. c. 35.
23 & 24 Vict. c. 145.
Conv. Act, 1881, s. 36.

All trustees who have accepted the trusts, and have not been discharged by procuring the appointment of a new trustee, or by the Court (see *Courtenay* v. *Courtenay*, 3 Jo. & L. 519), or under sect. 32 of the Conveyancing Act, 1881, must join in the receipt (*Crewe* v. *Dickin*, 4 Ves. 97). And trustees cannot authorize one of their number to give a receipt (*Re Flower*, 27 Ch. D. 592). The cases of *Webb* v. *Ledsam* (1 K. & J. 385), and *Hope* v. *Liddell* (21 Beav. 183, 202, 203), and *Ferrier* v. *Ferrier* (11 L. R. Ir. 56), cannot be considered sound law; (see Dart V. & P. 685, 6th ed.). The Conveyancing Act, 1881, s. 56, making the receipt on a purchase deed sufficient authority to the vendor's solicitor to give a discharge for the purchase-money did not apply to trustees (*Bellamy* v. *Metropolitan Board of Works*, 24 Ch. D. 387); but it is now extended to the case of trustees by the Trustee Act, 1888, s. 2. The solicitor producing the deed must, however, be the solicitor acting for the person entitled to

receive the money, and must produce the deed (*Re Woolwich Equitable Building Society*, 40 Ch. D. 491).

Form of the power.

2. With regard to powers of sale of estates limited to uses, it is not necessary to give express powers of revocation and new appointment; in whatever form the power be given, it will operate as a power of revocation and new appointment, and may be executed accordingly (Sug. Pow. 837). And although the power goes on to authorize or direct a conveyance "to the purchaser, his heirs, and assigns," the estate may be conveyed in any manner or to any uses the purchaser pleases (*ibid.* 838; and see Davidson, iii. 558 n.).

Conversion.

A power of sale, as distinguished from a trust for sale, does not operate as a conversion of property. The direction to sell must be imperative in order to operate as a conversion (*Fletcher* v. *Ashburner*, 1 W. & T. L. C.); but if it be exercised, the property will be converted accordingly, unless there be a trust declared of the proceeds sufficient to reconvert it (*Walter* v. *Maunde*, 19 Ves. 424; *De Beauvoir* v. *De Beauvoir*, 3 H. L. C. 524; *Greenway* v. *Greenway*, 29 L. J. Ch. 601; 2 De G. F. & J. 128; Sug. Pow. 856). The mere fact that the testator leaves the time of sale to the discretion of trustees does not prevent the direction from being imperative, so as to operate as a conversion from the testator's death (*Doughty* v. *Bull*, 2 P. W. 320; *Re Raw*, 26 Ch. D. 601).

Duties of donees.

3. The donees of these powers are within the terms of their power, if they exercise them without improper motives, and in the exercise of a reasonable discretion. If they have the usual power to sell and re-invest the proceeds in land, it is not absolutely essential that they should have an immediate re-investment in land in view—at any rate, where the settlement contains the usual clause for interim investments.

In *Mortlock* v. *Buller* (10 Ves. 309), Lord Eldon said that the object of sales of this nature must be to invest the money in the purchase of another estate to be settled to the same uses; and the trustees are not to be satisfied with probability upon that; but it ought to be with reference to an object at the time supposed practicable; or, at least, the Court would expect some

strong motive of family prudence justifying the conversion, if it is likely to continue money. Lord St. Leonards points out that the settlement in this case contained no clause for interim investment (Sug. Pow. 863). And even so, Lord Eldon does not lay down as an absolute proposition that under the ordinary power of sale and exchange, trustees can in no case sell, except with a view to a contemplated re-investment in land. He only says that a very special case must exist to justify such a course (see 7 Ha. 438). On the other hand Christian, L. J., in *Sankey* v. *Alexander* (9 I. R. Eq. at p. 302), cites Lord Eldon's observations in *Mortlock* v. *Buller*, and says that they lay down a code of rules for the guidance of trustees in the exercise of such powers; and his lordship continues thus: "First and before all things they must beware of letting the tenant for life get control of the power, as his object would probably be either to obtain a better income for himself, or as Lord Eldon pointedly puts it, 'to sell another estate to his family.' Second, the expression 'for such price as to the trustees shall seem reasonable,' must be construed to mean a reasonableness, intelligent, instructed, and impartial as between all who have interests under the settlement. Third, the trustees ought never to exercise the power, except with the proximate purpose of acquiring another estate to be settled to the same uses: and the continuing the proceeds of the sale as money, and investing it as such, should be a mere *ad interim* measure to be put an end to with all convenient speed by the purchase of another estate; from which it follows that nothing could be more improper than to place the money upon an investment which, even if it were secure, would present delay or difficulty in calling it in, whenever an offer of a new purchase should offer itself." It should be remembered that by the Settled Land Act the legislature has committed to the tenant for life that power which the Lord Justice thought it so dangerous to entrust to him; and it may be doubted whether the third of his propositions would be accepted in all its strictness by the English Courts.

The trustees must act reasonably and without improper purpose, holding an even hand between tenant for life and

remainderman. If they act *bonâ fide*, the Court will not interfere with the exercise of their discretion (*Re Blake*, 29 Ch. D. 913; *Thomas* v. *Williams*, 24 Ch. D. 558; and see Dart V. & P. 67, 6th ed.). But trustees do not discharge their duty properly, if they sell to the family solicitor without proper conditions and previous inquiry as to value, the object of the sale being to raise money to make an advance under a power in the settlement to one of the *cestuis que trust* (*Robinson* v. *Briggs*, 1 Sm. & G. 188).

In *Marshall* v. *Hadden* (4 De G. & Sm. 468; 7 Ha. 428), a mortgagee of settled estates required either to be paid off or to have the amount of his interest increased. The tenant for life proposed a new mortgagee at the same rate; but the trustees insisted on being the proper persons to carry the transaction into effect, and procured another mortgagee, but at a higher rate of interest; and in order to raise the expenses thereby incurred, proceeded to sell the estate under the power of sale in the settlement. On a bill filed by the tenant for life, the Court held that the trustees' conduct was unjustifiable and condemned them in costs.

Improvident contract.

If trustees enter into an improvident contract, it will not be cancelled, but the Court will not execute it (*Turner* v. *Harvey*, Jac. 178; and see *Goodwin* v. *Fielding*, 4 D. M. & G. 90; Dart, 1165, 1207, 6th ed.).

Exercise of power of sale by mortgagee.

A mortgagee with a power of sale is in a very different position from a trustee for sale. A mortgagee is under obligations to the mortgagor, but he has rights of his own which he is entitled to exercise adversely to the mortgagor. A trustee for sale has no business to place himself in such a position as to give rise to a conflict of interest and duty. But every mortgage confers on the mortgagee the right to realize his security, and find a purchaser if he can; and if in the exercise of his power he acts *bonâ fide* and takes reasonable precautions to obtain a proper price, the mortgagor has no redress, even although more might have been obtained for the property if the sale had been postponed (*Farrar* v. *Farrars' Limited*, 40 Ch. D. 395; *Cholmondeley* v. *Clinton*, 2 J. & W. 1; *Warner* v. *Jacob*, 20 Ch. D. 220). However, in *Jenkins* v. *Jones* (2 Giff. 99; 29

L. J. Ch. 493), a sale by a mortgagee was set aside on the ground that it was oppressive. And a mortgagee cannot sell for just enough to pay his own debt in entire disregard of the real value of the estate (*Colson* v. *Williams*, 61 L. T. 71). A purchaser for value without notice is protected by the usual clause exonerating purchasers, although the mortgage debt may have been discharged (*Dicker* v. *Angerstein*, 3 Ch. D. 600), but not if he has express notice of an irregularity which cannot be waived (*Selwyn* v. *Garfit*, 38 Ch. D. 273). And the mortgagee who sells without complying with the requirements of the proviso qualifying the power, will be liable in damages to the mortgagor and the second mortgagees (*Hoole* v. *Smith*, 17 Ch. D. 434). The Court does not as an ordinary rule interfere to prevent a sale by a mortgagee, except on the terms of the mortgagor paying into Court the amount sworn by the mortgagee to be due on his security (*Macleod* v. *Jones*, 24 Ch. D. at p. 299). The case of a mortgage to the mortgagor's solicitor is an exception to the rule (*ibid.*); but only in cases where the transaction is really an ordinary mortgage transaction (*Pooley's Trustee* v. *Whetham*, 33 Ch. D. 111). It is conceived, however, that speaking generally the duties of donees of powers mentioned in this paragraph, apply to mortgagees as well as to ordinary trustees.

It is not safe to accomplish indirectly under a power what the power does not authorize to be done directly (Sug. Pow. 867). But it seems the better opinion that when the power of sale contains the usual clause authorizing the proceeds to be applied in discharge of incumbrances, they may be applied in paying off charges under long terms, such as portions, as well as charges affecting the inheritance (Davidson, iii. 564, n.).

By sect. 5 of the Conveyancing Act, 1881, it is enacted as follows:— Conv. Act, s. 5.

Provision for incumbrances and sale free therefrom.

(1.) Where land, subject to any incumbrance, whether immediately payable or not, is sold by the Court, or out of Court, the Court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into Court, in case of an annual sum charged on the land, or of a capital sum charged on

a determinable interest in the land, of such amount as, when invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into Court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon the Court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in Court.

(3.) After notice served on the persons interested in or entitled to the money or fund in Court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.

It has been doubted whether the section applies to a perpetual rent-charge (*Re G. N. Rail. Co.*, 25 Ch. D. 788; and see s. 45 of the same Act).

Sale by auction.

Apart from the Act, under a power in a mortgage to sell either by public auction or private contract for the best price in money that could reasonably be obtained, a valid sale by private contract might be made, although the property had not been put up or advertised for sale by auction, if the price were reasonable (*Davey* v. *Durrant*, 1 De G. & J. 535; *Harper* v. *Hayes*, 2 D. F. & J. 542); and a reserve bidding might be

fixed (*Re Peyton*, 10 W. R. 515; 30 B. 252). But an express authority to sell by public auction did not authorize a sale by private contract (*Daniel* v. *Adams*, Ambl. 495; *Re Loft*, 8 Jur. 206); although such sales have been upheld (*Else* v. *Barnard*, 28 B. 228; *Bousfield* v. *Hodges*, 33 B. 90).

Power of sale does not authorize a gift.

But the power in *Darcy* v. *Darrant* was held to be not well exercised by an arrangement by which part of the mortgaged premises was valued and conveyed to the trustees of a charity at the price settled by the valuer, but no money ever passed, the mortgagee in fact presenting the charity with the amount: the sale was set aside, as being colourably and fictitiously made, though, in the opinion of the Court, not with any dishonest intention: it was, in fact, a gift and not a sale (*ibid.*). Donees of powers of sale may sell either together or in parcels (Dart, 76, 6th ed.); but a power to sell all or any part of an estate would probably not authorize the sale of an undivided share (*ibid.*; Chance, Pow. 241); nor of anything less than the whole of a mortgagee's interest in the part sold.

Sale in consideration of rent-charge.

And it seems that the ordinary power of sale and exchange, where the money is to be invested in the purchase of other messuages, tenements, or hereditaments, to be conveyed to the same uses, does not authorize a sale in consideration of a rent-charge (*Read* v. *Shaw*, Sug. Pow. 953; *Ex parte Gartside*, 6 L. J. Ch. 266; and cf. 19 & 20 Vict. c. 120, s. 12). Lord St. Leonards (Pow. 864) remarks on this that, although a rent-charge may be held to be an estate of inheritance in fee simple within a covenant to settle such an estate, yet where a landed estate is settled with the usual powers of sale and exchange, it would be contrary to the meaning of the power to substitute a mere rent-charge for the territorial possession. On the other hand, in *Re Peyton* (7 Eq. 463), where real estates were settled, and there was the usual power to sell and invest the proceeds in the purchase of other manors, lands, or hereditaments, to be situate in England or Wales, of a clear and indefeasible estate of inheritance in fee simple in possession, the Master of the Rolls held that the settlement authorized an investment in freehold ground rents: and in *Bellot* v. *Littler* (22 W. R. 836;

30 L. T. 861), a power to invest in land was held to authorize the purchase of mines under part of the settled estates. And the donees of a power of sale and exchange may pay or receive money for owelty of exchange, although not expressly authorized to do so (*Bartram* v. *Whicheote*, 6 Sim. 86). But when the estates are legal and the power of exchange is limited to exchange for land of at least equal value, if that value is not obtained in the exchange, the exchange is void at law, and equity will not interfere (*Ferrand* v. *Wilson*, 4 Ha. 385; see now S. L. Act, 1882, s. 3, and S. L. Act, 1890, s. 9).

Owelty of exchange.

Donees of a power of sale cannot give a future option of purchase (*Clay* v. *Rufford*, 5 De G. & Sm. 768; *Oceanic Steam Navigation Co.* v. *Sutherberry*, 16 Ch. D. 236). They must exercise their best endeavour to get a fair and proper price at the time they sell (*Downes* v. *Grazebrook*, 3 Mer. 200; *Ord* v. *Noel*, 5 Mad. 438). But there is not necessarily any impropriety in entering into a conditional contract for sale shortly before the power of sale has arisen (*Major* v. *Ward*, 5 Ha. 598; *Farrar* v. *Farrars, Limited*, 40 Ch. D. at p. 412). And it was held in *Cookson* v. *Lee* (23 L. J. Ch. 473), that trustees who were directed by a private Act to sell building land as such were authorized to lay it out and make the necessary roads and pay the costs out of the proceeds of sale; (and see S. L. Act, 1882, s. 16).

Power of sale does not authorize future option.

Apart from the Conveyancing Act, 1881, if trustees for sale join with the owner of another property in selling both properties together, they do not commit a breach of trust (1) if they are satisfied that such a mode of sale is beneficial to the *cestuis que trust;* (2) if their share of the purchase-money has been duly apportioned before the completion of the purchase, and is paid to them; and (3) if such share has been apportioned by themselves, acting under proper advice (*Cooper to Harlech*, 4 Ch. D. 802, explaining *Rede* v. *Oakes*, 4 D. J. & S. 505; *Morris* v. *Debenham*, 2 Ch. D. 540). This, however, does not extend to the case of a lease (*Tolson* v. *Sheard*, 5 Ch. D. 19). But first and second mortgagees can join in selling, and can give a valid receipt for their portion of the purchase-money (*McCarogher* v. *Whieldon*, 34 B. 107; *Re Thompson and Holt*, 44 Ch. D. 492;

Sale of trust property with other property.

and as to a mortgagee selling property comprised in two different mortgages, see *Hiatt* v. *Hillman*, 19 W. R. 694).

Power to sell by auction, &c.

It is now enacted by sect. 35 of the Conveyancing Act, 1881 :—

(1.) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to resell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this Act.

And by the Settled Land Act, 1882, s. 19, it is enacted that where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur in any manner and to any extent necessary or proper for any purpose of this Act, with any person entitled to or having power or right of disposition of or over another undivided share.

Discretion of trustees to consent.

Trustees who have a power of sale at the request and by the direction of the tenant for life have a discretion in complying or refusing to agree to a request by the tenant for life to sell, and the Court will not control such discretion (*Thomas* v. *Dering*, 1 Keen, 729); but if they disclaim, the Court may execute the power (*Browne* v. *Paull*, 16 Jur. 707; *Prentice* v. *Prentice*, 10 Ha. App. xxii.; *Hewett* v. *Hewett*, 2 Eden. 332).

Trustees may adopt as their own a contract entered into by the tenant for life (*Blackwood* v. *Borrowes*, 4 Dr. & War. 441):

in other words, they may negotiate a sale by an agent, and that agent may be the tenant for life, and his agency may be adopted *ex post facto*.

Deposit.

A tenant for life, whose consent is requisite to a sale, and who is made party to a contract in that capacity, and receives a deposit, is not entitled to retain the deposit for his own benefit if it is forfeited, but such deposit forms part of the trust property (*Shrewsbury* v. *Shrewsbury*, 18 Jur. 397).

Whether power of sale or exchange authorizes partition.

4. The question whether the ordinary power of sale and exchange authorizes a partition has given rise to considerable discussion, and the authorities cannot be said to lay down the law in a manner which is entirely satisfactory. Apart from authority, it is difficult to see why trustees, who are authorized to dispose of lands by way of exchange for an equivalent in other lands, should not give an undivided moiety of a portion of the settled land for an undivided moiety in the residue; and if the trustees can sell their undivided moiety of part of the settled land and invest the purchase money in buying the moiety of the residue, it would seem reasonable that they should avoid circuity by doing directly that which they could do indirectly (cf. *Re Mackenzie*, 23 Ch. D. 750; *Re Tennant*, 40 Ch. D. 595). Having regard to the Settled Land Act and the powers thereby created, the point will be of less importance in the future; but it is submitted that the authorities apart from the Act decide this:—

> A power of sale does not, but a power of exchange does, authorize a partition (*McQueen* v. *Farquhar*, 11 Ves. 467; *Re Frith and Osborne*, 3 Ch. D. 618); but, as to the latter, only when the land is held in two moieties, and no more.

The earlier cases are reviewed and commented on by the late M. R. in the latter case; (and see Sug. Pow. 856).

It is to be observed that the decision extends only to powers of exchange, and is founded in great measure on *Doe* v. *Spencer* (2 Ex. 752), where the full Court held that a power to exchange

in an Inclosure Act could be exercised by making a partition, and that there is no substantial difference between partition and exchange as alleged in Shep. Touch. 292. But the judgment of the Court is confined to a case between two parties only. "The things given and taken in exchange run in parallel lines and cannot pass into three lines or a triangle (see *per cur.* in *Eton College* v. *Bishop of Winchester*, 3 Wils. 468, 497). So that in no case of three or more co-parceners, or tenants in common, can a partition be made by means of an exchange. But, if A. and B. be tenants in common of Blackacre and Whiteacre, we can discover no principle which is to prevent A. from giving his moiety of Blackacre to B., in exchange for B.'s moiety of Whiteacre. . . . As a general principle, it may be true that a power of exchange does not necessarily include a power to make partition in all cases, as where, for instance, the partition is to be made among three or more parties, as was the case in *Abel* v. *Heathcote* (4 B. C. C. 277); but it does not surely follow from that that where there are only two parties, the exchange of a moiety of one part of the land held in common for a moiety of the other is to be considered bad, because it effectuates a partition. If we are right in holding (contrary to what is said in Touchstone) that at common law two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow, where the moiety of an estate is settled to uses, with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one to the uses of the settlement, the other by the party entitled to the other moiety."

In *McQueen* v. *Farquhar* (11 Ves. at p. 473), Lord Eldon says, "A power to make partition would not include a power to sell, and I think a power of exchanging would not." But this was no part of the decision, which was that a power of sale, operating under the Statute of Uses, was not well exercised by a partition.

In *Brassey* v. *Chalmers* (16 B. 223), Lord Romilly considered the clear effect of *McQueen* v. *Farquhar* to be, that if *Abel* v.

Heathcote (2 Ves. jun. 98) should be thought to sanction the doctrine either that a power of exchange or a power of sale, *expressed in ordinary terms*, authorizes partition, that doctrine is not to be supported, and that it is in truth overruled by and is inconsistent with the decision in *McQueen* v. *Farquhar*. (This part of the case was not affected by the appeal (4 De G. M. & G. 528).

Evidence of intention.

But the whole context of the instrument creating the power may show that the intention was that the power of sale and exchange should extend to partition. Thus, in *Bradshaw* v. *Fane* (3 Drew. 534), where the power was to make sale and dispose of and convey in exchange, and the powers to revoke and limit new uses also referred to disposition, and the declaration as to the application of the money to be obtained referred in terms to *partition*, it was held that on the whole context the settlor intended the power to be in effect a power of partition as well as of exchange.

It has been suggested, that under the ordinary power of sale a partition might be effected by selling the undivided portion and purchasing with the proceeds the portion required (*Att.-Gen.* v. *Hamilton*, 1 Madd. 223); and so an exchange might be effected by reciprocal sales (Sug. Pow. 858).

Enfranchisement.

And it seems that a power of sale and exchange authorizes an enfranchisement (Dart, V. & P. 6th ed. 89; and cf. *Re Adair*, 16 Eq. 124).

A power of sale authorizes a mortgage.

5. A power of sale generally authorizes a mortgage.

In *Mills* v. *Banks* (3 P. W. 1), there was a trust to raise portions, and an ambiguity arose from the nature of the trust whether the portions were to be raised by sale or mortgage; the Court decreed a sale, but the L. C. said (p. 9), "A power to sell implies a power to mortgage, which is a conditional sale." On this Lord Langdale, in *Haldenby* v. *Spofforth* (1 B. 390, 395), says, "This I conceive to mean that where it is intended to preserve the estate, there under a direction for sale, a mortgage will sufficiently answer the purpose;" that is, as explained

by Lord St. Leonards (1 D. M. & G. at p. 645), where the estate is to go subject to the charge, there can be no objection to raising that charge by mortgage. In *Ball* v. *Harris* (4 M. & C. 264, at p. 267), Lord Cottenham says, "So long ago as the case of *Mills* v. *Banks*, in 1724, it seems to have been assumed as settled that a power to sell implies a power to mortgage, which is a conditional sale; and no case has been quoted throwing any doubt on that proposition."

Stroughill v. *Anstey* (1 D. M. & G. 635) was a case of absolute trust for sale, and the property was leasehold; and it is submitted that Lord St. Leonards, when speaking of a power of sale in his judgment in that case, means a power which is to be exercised so as to work conversion, and not a mere power coupled with a trust for reinvestment in land. He qualifies the generality of the statements of his predecessors above quoted as follows: "My own experience is that, generally speaking, a power of sale out and out, for a purpose or with an object beyond the raising a particular charge, does not authorize a mortgage: but that where it is for raising a particular charge, and the estate itself is settled or devised subject to that charge, there it may be proper under the circumstances to raise the money by mortgage; and the Court will support it as a conditional sale, as something within the power, and as a proper mode of raising the money."

In that case Lord St. Leonards also said, that in a case where trustees have a legal estate, and are to perform a particular trust through the medium of a sale, although a direction for a sale does not properly authorize a mortgage, yet where the circumstances would justify the raising of a particular charge by mortgage, it must be in some measure in the discretion of the Court whether it will sanction that particular mode or not. It may be the saving of an estate, and the most discreet thing that can be done: and as the legal estate would go, and as the purposes of the trust would be satisfied, it was impossible for the Court to lay down that in every case of a trust for sale to raise particular sums, a mortgage might not under the circumstances be justified. As a general rule, however, there could be no

difficulty in saying that a mortgage under a mere trust for conversion out and out is not a due execution of that trust; (and see *Page* v. *Cooper*, 16 B. 396; *Devaynes* v. *Robinson*, 24 B. 86).

In *Bennett* v. *Wyndham* (25 B. 521), a testator devised real estates to trustees in fee, upon trust out of the rents, issues, and profits thereof to pay two annuities, and by the same ways and means or such other ways and means (except a sale or sales), as they might think proper, to raise money to pay off certain charges. The Master of the Rolls thought that the word "sale" expressly excluded the possibility of raising the money by sale of any portion of the estate, and that the word "sale" virtually included within it the word "mortgage," which was practically a sale, and could not be resorted to without giving the mortgagee a power of getting possession of the estate, if the charge were not paid off when required.

Execution of power of sale in mortgage.

6. A power of sale in a mortgage may, if exercised *bonâ fide*, be validly exercised by a sale for a sum, part of which is allowed by the mortgagee to remain on mortgage at his own risk (*Davey* v. *Durrant*, 1 De G. & J. 535; *Thurlow* v. *Mackeson*, L. R. 4 Q. B. 97; *Bettyes* v. *Maynard*, 31 W. R. 461).

In *Davey* v. *Durrant* there was the usual power, but a clause was added providing that all arrangements, sales, &c., made by the mortgagee should be as valid and effectual without, as the same would be with, the concurrence of the mortgagor. The mortgagee agreed to sell the mortgaged premises, and it was by the *same instrument* further agreed that part of the purchase-money (seven-twelfths) should remain on mortgage of the said premises. It was objected that the power did not authorize the mortgagee to permit part of the purchase-money to remain outstanding when he sold. But L. J. Knight-Bruce held that it is not beyond the right or authority of a mortgagee, with a

power of sale to effect a sale, of which one of the terms shall be that even a considerable portion of the purchase-money shall be allowed to remain on mortgage of the property, that mortgage being, as between the seller and those entitled to the equity of redemption, at the seller's risk; that is, he charging himself with the whole amount of the purchase-money in account with them, as had been done in the case before the Court. The L. J. Turner rested his decision on the clause above referred to with regard to the mortgagor's concurrence.

In *Thurlow* v. *Mackeson*, the contract for the sale was a separate and distinct instrument, and no trace of the arrangement that part of the purchase-money should remain on mortgage appeared on it. The transaction was held to be valid, being, in fact, a sale by the mortgagee under his power and a mortgage back to him.

There may of course be collusive sales; but in the absence of collusion or fraud, there is nothing in the terms of an ordinary power of sale in a mortgage to prevent a sale by the mortgagee, allowing part of the purchase-money to remain on mortgage at his own risk; (and see Sug. V. & P. 14th ed. 66; Dart, V. & P. 6th ed. 90); but it is submitted that he cannot sell for a rent-charge or anything but a gross sum of money.

Tenant for life whose consent is required may buy.

7. A power of sale in trustees, to be exercised at the request or with the consent of the tenant for life, may be exercised by a sale to such tenant for life (*Howard* v. *Ducane*, T. & R. 81; *Dicconson* v. *Talbot*, 6 Ch. 32).

The ground of the rule is that the power of consenting to, or requesting an exercise of the power of sale, is given to the tenant for life for his own benefit, and that he is not in a fiduciary position as to it (*ibid.* 37).

The tenant for life is not, however, in the same position as a stranger as to the obligation to communicate what he knows. He may, by reason of his peculiar opportunities of obtaining information, be under some obligation to communicate circum-

stances which he knows, and which he knows that the trustees do not know (*ibid.* 38).

Where he is sole donee of power.

It is submitted that in cases where the tenant for life is himself the donee of the power, whether with or without the consent of trustees, and whether under a power in an instrument or under the Settled Land Act, he cannot purchase from himself. A sale by a person to himself is no sale at all, and a power of sale does not authorize the donee of the power to take the property subject to it at a price fixed by himself, even although such price is the full value of the property. Such a transaction is not an exercise of the power, and the interposition of a trustee, although it gets over the difficulty so far as form is concerned, does not affect the substance of the transaction (*Farrar* v. *Farrars, Limited*, 40 Ch. D. at p. 409). The case before the Court was that of a sale by mortgagees; but it is submitted that the observations quoted are of general application.

The legislature has now provided for the case of a tenant for life under the Settled Land Acts by sect. 12 of the Act of 1890, which enacts:—

S. L. A. 1890, s. 12.

"Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction."

In addition to the objection that there must be two parties to a bargain, and that a man cannot contract with himself, the general rule in equity is that a man must not place himself in a situation in which his interest conflicts with his duty. In *Grover* v. *Hugell* (3 Russ. 428), the Master of the Rolls refused to enforce specific performance of a contract, where the title was derived from an incumbent, who had sold part of the glebe for the redemption of land tax to a purchaser in trust for himself.

The duty of the rector was, to obtain the best possible price for the land sold, and his interest as purchaser was, to pay the least possible price for it. The sale in that case was required to be by public auction, and before two of the commissioners or some person authorized by them; and their approbation of the sale was required; these requirements appear to have been fulfilled.

In *Beaden* v. *King* (9 Ha. 499), the question arose under the statute 42 Geo. 3, c. 116, giving power to prebendaries to sell: the Vice-Chancellor said (p. 519), "I agree that where a power of sale is given without restriction, to a party having a limited interest only, it may well be held that the power to sell imports a negative upon the power to buy, because the power to sell is in the nature of a trust, and it is obvious that the party who is interested to sell cannot in such a case safely be permitted to buy. This rule, I think, may be carried further; that a restriction put upon the power of sale will not, in all cases, authorize the party, to whom the power to sell is given, to become the purchaser of the estate which is the subject of the power; but I am not prepared to hold that in no case would this Court permit the party who has the power to sell to become the purchaser of the estate to be sold under the power, and it would be contrary to authority so to lay down the rule. I think it must in each case depend upon the circumstances under which, and the purposes for which, the power was given, and upon the nature and extent of the restrictions which are put upon the exercise of the power. The objections which, in the case of an unrestricted power, apply with so much force to the donee of the power being permitted to buy, certainly do not apply with the same force in the case of a restricted power. In proportion as the power is restricted, the dangers incident to allowing the donee to purchase are diminished." In the case before the Court, the Lords Commissioners had an absolute veto on the sale, and (s. 74) might require to be furnished with all information which the donee of the power might possess.

Power to raise money.

In *Greenlaw* v. *King* (3 B. 49), a rector was empowered by Act of Parliament, with consent of his Bishop, who was patron of the living, to raise money by annuity to build a new house,

the plan and accounts of which were to be approved by the Bishop. The Bishop advanced the money himself, and obtained an annuity charged on the living; although there was no unfairness, the transaction was set aside. And Lord Eldon's remark (T. & R. 86) that "there must be a diligent attention on the part of the trustees to see that they get a reasonable price," seems incompatible with holding that a tenant for life, with an unrestricted power of sale, can sell to himself.

Lease by tenant for life to himself.

On the other hand, in *Wilson* v. *Sewell* (4 Burr. 1974), a building lease made under a power by a tenant for life was upheld, although it was granted to a person in trust for the tenant for life himself; (see, too, *Cardigan* v. *Montague*, Sug. Pow. 918).

By mortgagor to himself.

On the same principle, in *Bevan* v. *Habgood* (1 J. & H. 222), it was held that a mortgagor, to whom, until entry by the mortgagee, a power of granting building leases was reserved, might make a lease to a trustee for himself. The Vice-Chancellor said, "The matter reduces itself to this (which but for the authorities on the analogous case of tenant for life and remainderman would be a very grave question) whether under a power to grant leases at the best rents and subject to other restrictions, the mortgagor can make a valid bargain, being himself the person with whom the bargain is in substance made. The authorities decide that such a bargain may be made by a tenant for life, the ground being that the estate gets all the benefit to which it is entitled. This assumes the honesty of the tenant for life, and it comes to this: that in this particular class of cases, the Court does not hold by its general doctrine, which prohibits an agent from contracting for his own benefit as against his principal. Actual fraud would, of course, be material.

Mortgagor may not buy from first mortgagee to detriment of second mortgagee.

It has been held (*Otter* v. *Vaux*, 2 K. & J. 650; 6 D. M. & G. 638), that a mortgagor cannot purchase from a first mortgagee under his power of sale so as to affect the second mortgagee, the mortgagor's duty being to pay off the first mortgage, the power of sale under which could only arise on his default; he could not therefore take advantage of his own default to purchase the estate under the power to the prejudice

of the second mortgagee. And if the trustee in bankruptcy of the mortgagor buys from the first mortgagee, he becomes merely a transferee of the mortgage as against the second mortgagee (*Bell* v. *Sunderland Building Society*, 24 Ch. D. 618; and see *Cracknall* v. *Janson*, 6 Ch. D. 735; *Ledbrook* v. *Passman*, 57 L. J. Ch. 855).

Rules of the Court as to sales by persons in fiduciary positions.

The rules of the Court on the subject of sales to themselves by persons standing in fiduciary relations to the persons interested, are thus stated by L. J. Giffard (*Guest* v. *Smythe*, 5 Ch. 551, 556): "A person who has the conduct of a sale under the direction of the Court cannot buy; and, of course, as he cannot buy, his solicitor cannot buy. Parties to the suit cannot buy without the special leave of the Court; and because they cannot buy, their solicitor also cannot buy. A trustee for sale, an assignee under a bankruptcy, or the solicitor of an assignee cannot buy; and, generally speaking, where a man's duty and interest in respect of the purchase conflict, he cannot become a purchaser"; (and see *Fox* v. *Mackreth*, 1 W. & T. L. C. 115; *Luddy* v. *Peard*, 33 Ch. D. 500; Dart, 6th ed. 35).

8. Extensive powers of sale are now conferred on tenants for life by the Settled Land Acts. Section 2 of the Act of 1882 defines the terms used in the Act, as follows:—

S. L. A. 1882, s. 2. Definition.

"(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires.

"(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this Act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

"(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this Act settled land, and is, in relation to the settlement, referred to in this Act as the settled land.

"(4.) The determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

"(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement.

"(6.) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this Act.

"(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent.

"(8.) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act, are for purposes of this Act trustees of the settlement.

"(9.) Capital money arising under this Act, and receivable for the trusts and purposes of the settlement, is in this Act referred to as capital money arising under this Act.

"(10.) In this Act—

"(i.) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

"(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or other-

wise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

"(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

"(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes:

"(v.) Manor includes lordship, and reputed manor or lordship:

"(vi.) Steward includes deputy steward, or other proper officer, of a manor:

"(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will:

"(viii.) Securities include stocks, funds, and shares:

"(ix.) Her Majesty's High Court of Justice is referred to as the Court:

"(x.) The Land Commissioners for England as constituted by this act are referred to as the Land Commissioners:

"(xi.) Person includes corporation."

Section 8 of the Act of 1884 enacts as follows:— S. L. A. 1884, s. 8.

"For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife."

Section 4 of the Act of 1890 enacts as follows:— S. L. A. 1890, s. 4.

"(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family

arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

"(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this Act, unless inconsistent with the nature or terms of the disposition."

S. L. A. 1882, s. 3. Powers of tenant for life.

Section 3 of the Act of 1882 enacts as follows:

"A tenant for life—

"(i.) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

"(ii.) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

"(iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

"(iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition."

S. L. A. 1882, s. 4. Restrictions on sales, &c.

Section 4 of the Act of 1882 imposes restrictions upon and makes provisions as to the mode of sale as follows:—

"(1.) Every sale shall be made at the best price that can reasonably be obtained.

"(2.) Every exchange and every partition shall be made for

the best consideration in land or in land and money that can reasonably be obtained.

"(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

"(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

"(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

"(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

"(7.) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

"(8.) Settled land in England shall not be given in exchange for land out of England."

This section was amended by s. 11 of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), which has now been repealed by 53 & 54 Vict. c. 70, s. 102. This latter Act, however, re-enacts s. 11 of the earlier Act by s. 74, which is as follows:—

"(1.) The Settled Land Act, 1882, shall be amended as follows:— 53 & 54 Vict. c. 70, s. 74.

"(a) Any sale, exchange, or lease of land in pursuance of the said Act, when made for the purpose of the erection on such land of dwellings for the working classes, may be made at such price, or for such consideration, or for such rent, as having regard to the said purpose, and to all the circumstances of the case, is the best that Working classes.

can be reasonably obtained, notwithstanding that a higher price, consideration, or rent might have been obtained if the land were sold, exchanged, or leased for another purpose.

"(b) The improvements on which capital money may be expended, enumerated in s. 25 of the said Act, and referred to in s. 30 of the said Act, shall, in addition to cottages for labourers, farm-servants, and artizans, whether employed on the settled land or not, include any dwellings available for the working classes, the building of which in the opinion of the Court is not injurious to the estate.

"(2.) Any body corporate holding land may sell, exchange, or lease the land for the purpose of the erection of dwellings for the working classes at such price, or for such consideration, or for such rent as having regard to the said purpose, and to all the circumstances of the case is the best that can be reasonably obtained, notwithstanding that a higher price, consideration or rent might have been obtained if the land were sold, exchanged or leased for another purpose." Cf. s. 29 of the Charitable Trusts Act, 1855.

S. L. A. 1890, s. 18.

And by s. 18 of the Settled Land Act, 1890, it is provided that—

"The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression 'working classes' included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum."

In addition to the persons defined as tenants for life the following persons have the powers of a tenant for life, as the following sections of the Act of 1882 show:—

S. L. A. 1882, s. 58.

Persons who have powers of tenant for life.

"58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely):

"(i.) A tenant in tail, including a tenant in tail who is by Act

of Parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services:

"(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

"(iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this Act shall bind the Crown:

"(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent:

"(v.) A tenant for the life of another, not holding merely under a lease at a rent:

"(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

"(vii.) A tenant in tail after possibility of issue extinct:

"(viii.) A tenant by the curtesy:

"(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

"(2.) In every such case, the provisions of this Act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under

which his estate or interest arises, and to the land therein comprised.

"(3.) In any such case any reference in this Act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

S. L. A. 1882, s. 59. Infant absolutely entitled.

"59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

S. L. A. 1882, s. 60. Infant tenant for life.

"60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

S. L. A. 1882, s. 61. Married woman.

"61.—(1.) The foregoing provisions of this Act do not apply in the case of a married woman.

"(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this Act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this Act.

"(3.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this Act.

"(4.) The provisions of this Act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

"(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

"(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this Act.

S. L. A. 1882, s. 62. Lunatic.

"62. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this Act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate."

The powers conferred upon a tenant for life of dealing with the mansion-house by s. 15 of the Act of 1882 were repealed by s. 10 of the Act of 1890 (sub-s. 1); and in lieu thereof the latter section goes on to enact as follows:—

S. L. A. 1890, s. 10. Mansion house.

"(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the Court.

"(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section."

Powers of raising money for certain purposes are conferred by s. 18 of the Act of 1882, which enacts as follows:—

S. L. A. 1882, s. 18. Power to raise money.

"Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or

interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under the Act."

And by s. 11 of the Act of 1890, which enacts as follows:—

S. L. A. 1890, s. 11.

"(1.) Where money is required for the purpose of discharging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction, on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

"(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable."

S. L. A. 1882, s. 31. Tenant for life may contract.

A tenant for life may contract as provided by s. 31 of the Act of 1882 which enacts:—

"(1.) A tenant for life—

"(i.) May contract to make any sale, exchange, partition, mortgage, or charge; and

"(ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this Act; and any such consideration, if paid in money, shall be capital money arising under this Act; and

"(iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this Act; and

"(iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for

or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

"(v.) May enter into a contract for or relating to the execution of any improvement authorized by this Act, and may vary or rescind the same; and

"(vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this Act, and may vary or rescind the same.

"(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

"(3.) The Court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

"(4.) Any preliminary contract under this Act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof."

And the tenant for life may complete his predecessor's contract by virtue of s. 6 of the Act of 1890, which enacts:—

"A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title." S. L. A. 1890, s. 6.

And s. 20 of the Act of 1882 enacts as follows as to the general effect of the conveyance by a tenant for life:—

"(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights S. L. A. 1882, s. 20. Conveyance by tenant for life.

or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge.

"(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

"(i.) All estates, interests, and charges having priority to the settlement; and

"(ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

"(iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

"(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls."

Sects. 38 to 45 inclusive of the Act of 1882 make provision for the trustees of the settlement for the purposes of the Act, and define their powers and duties as follows:—

S. L. Act, 1882, s. 38. Trustees for purposes of the Act.

"38.—(1.) If at any time there are no trustees of a settlement within the definition in this Act, or where in any other case it is expedient, for purposes of this Act, that new trustees of a settlement be appointed, the Court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this Act.

"(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this Act become and be the trustees or trustee of the settlement.

S. L. Act, 1882, s. 39. Payment of capital money to trustees.

"39.—(1.) Notwithstanding anything in this Act, capital money arising under this Act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

"(2.) Subject thereto, the provisions of this Act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

S. L. Act, 1882, s. 40. Receipt clause.

"40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is

wanted for any purpose of this Act, or that no more than is wanted is raised.

S. L. Act, 1882, s. 41. Protection to trustees.

"41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

S. L. Act, 1882, s. 42. Further protection to trustees.

"42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this Act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

S. L. Act, 1882, s. 43. Reimbursement.

"43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

S. L. Act, 1882, s. 44. Application to Court.

"44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this Act, or respecting any matter relating thereto, the Court may, on the application of either party, give such directions respecting the matter in difference, and respecting the costs of the application, as the Court thinks fit.

"45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same. S. L. Act, 1882, s. 45. Notice to trustees.

"(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

"(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

The provisions of the last-mentioned section as to the notice thereby required to be given to the trustees of the settlement have been modified by s. 5 of the Act of 1884, which is as follows:— S. L. Act, 1884, s. 5. Notice to trustees.

"(1.) The notice required by section forty-five of the Act of 1882 of intention to make a sale, exchange, partition, or lease may be notice of a general intention in that behalf.

"(2.) The tenant for life is, upon request by a trustee of the settlement, to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

"(3.) Any trustee, by writing under his hand, may waive notice either in a particular case, or generally, and may accept less than one month's notice.

"(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this Act.

"(5.) Provided that a notice, to the sufficiency of which objec-

tion has been taken before the passing of this Act, is not made sufficient by virtue of this Act."

The 16th and 17th sections of the Act of 1890 are designed to remove difficulties which had arisen upon the construction of the former Acts, and enact as follows:—

S. L. Act, 1890, ss. 16 and 17. Amendments as to trustees for purposes of the Act.

"16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

"(i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then

"(ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

"17.—(1.) All the powers and provisions contained in the Conveyancing and Law of Property Act, 1881, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the Court or by the settlement, or under provisions contained in the settlement.

"(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the passing of this Act.

"(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this Act otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881."

The Act contains general provisions, savings, and restrictions, which are enacted by ss. 50 to 57 inclusive of the Act of 1882.

"50.—(1.) The powers under this Act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement. S. L. Act, 1882, s. 50. Powers not assignable.

"(2.) A contract by a tenant for life not to exercise any of his powers under this Act is void.

"(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this Act.

"(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this Act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.

"51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this Act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this Act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any S. L. Act, 1882, s. 51. Prohibition of exercise of powers void.

power under this Act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

"(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

S. L. Act, 1882, s. 52. Provision against forfeiture.

"52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this Act shall not occasion a forfeiture.

S. L. Act, 1882, s. 53. Tenant for life trustee for all parties.

"53. A tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

S. L. Act, 1882, s. 54. Protection of purchasers.

"54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this Act.

S. L. Act, 1882, s. 55. Exercise of powers of Act.

"55.—(1.) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

"(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

"(3.) Where any provision in this Act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only

(unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this Act.

S. L. Act, 1882, s. 56. Saving of other powers.

"56.—(1.) Nothing in this Act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this Act are cumulative.

"(2.) But, in case of conflict between the provisions of a settlement and the provisions of this Act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this Act, the provisions of this Act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this Act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this Act.

"(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the Court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

S. L. Act, 1882, s. 57. Additional or larger powers in settlement.

"57.—(1.) Nothing in this Act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this Act.

"(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this Act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this Act, unless a contrary intention is expressed in the settlement."

The Acts also provide against the Act being rendered ineffectual by the settlement being framed in the shape of an

absolute trust for sale. In such cases the powers of the Act may still be exercised by the tenant for life under the restrictions imposed by s. 63 of the Act of 1882, and ss. 6 and 7 of the Act of 1884, which enact as follows:—

S. L. Act, 1882, s. 63. Absolute trusts for sale.

"63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this Act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this Act are for purposes of this Act trustees of the settlement.

"(2.) In every such case the provisions of this Act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises,

and to the land therein comprised, subject and except as in this section provided (that is to say) :

" (i.) Any reference in this Act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

" (ii.) Capital money arising under this Act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this Act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

" (iii.) Capital money arising under this Act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

" (iv.) Land of whatever tenure acquired under this Act by purchase, or in exchange, or on partition, shall be

conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

S. L. Act, 1884, s. 6. Consents by tenants for life.

"6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that Act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

"(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that Act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that Act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that Act.

"(3.) This section applies to dealings before, as well as after, the passing of this Act.

S. L. Act, 1884, s. 7. Leave of Court required.

"7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

"(i.) Those powers are not to be exercised without the leave of the Court.

"(ii.) The Court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given.

"(iii.) The Court may from time to time rescind, or vary,

any order made under this section, or may make any new or further order.

" (iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

" (v.) An order under this section may be registered and re-registered, as a lis pendens, against the trustees of the settlement named in the order, describing them on the register as 'Trustees for the purposes of the Settled Land Act, 1882.'

" (vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a lis pendens.

" (vii.) An application to the Court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.

" (viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.

" (ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.

" (x.) This section is not to affect any dealing which has taken place before the passing of this Act, under any trust or power to which this section applies."

CHAPTER XVII.

POWERS OF LEASING.

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Nature of powers of leasing.

1. The principles applicable to other powers apply equally to powers of leasing.

The power is to be exercised for the benefit of the estate; but the lessee is a purchaser *pro tanto* and is entitled to be relieved,

as are other purchasers, against defects in the execution of the powers (see *ante*, Ch. VII.). The remainderman has no remedy against the lessee except such as may arise out of an imperfect or improper execution of the power. "There is no case to be found in our books in which a lease, conformable to the literal tenor of the words in which the power is given, has been held invalid at law, on the ground of any supposed or real hardship thereby inflicted on the remainderman; and it would be strange if such a case could be found, for as the remainderman takes what is given to him subject to the power, he must take the advantage *cum onere*, and has no reasonable ground of complaint if that should happen which the framer of the power, who had the *jus disponendi*, contemplated" (*per* Baron Alderson, 1 H. L. C. 576).

The aid afforded to lessees claiming under defective executions of powers of leasing has been extended by the Acts 12 & 13 Vict. c. 26, and 13 & 14 Vict. c. 17 (*ante*, p. 351), and considerable alterations in the law applicable to leases by limited owners have been effected by the Settled Land Acts of 1882 and 1884, and by the Conveyancing Acts, 1881 and 1882. But the law relating to the execution of powers of leasing remains to a great extent the same; and the Settled Land Act, 1882, s. 56, expressly preserves other powers of leasing affecting the settled estates, and provides that the statutory powers given by the Act shall be cumulative; but in case of conflict the provisions of the Act are to prevail; and the consent of the tenant for life is made necessary to the exercise by the trustees of the settlement or other persons of any power conferred by the settlement exerciseable for any purpose provided for in the Act; (as to this section, see *Re Duke of Newcastle's S. E.*, 24 Ch. D. 129).

Contracts for leases.

2. "Where a lease is made under a power contained in a settlement, will, Act of Parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purposes of the deduction of title to an intended assign, form part of the title or evidence of title to the lease" (Conv. Act, 1882, s. 4). This applies to all leases whether made before or after the 1st of January, 1883.

The object of this section is by no means obvious. The antecedent contract is merged in the perfected deed (*Squire* v. *Campbell*, 1 My. & Cr. 459). "If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed. . . . You have no right to look at the contract either for the purpose of enlarging or diminishing or modifying the contract which is to be found in the deed itself" (*per* James, L. J., in *Leggott* v. *Barrett*, 15 Ch. D. at p. 309). The only case in which, in practice, a purchaser calls for the production of former conditions of sale or contracts is where such conditions or contracts are recited in some deed of conveyance by trustees which forms part of the title; and the reason is that the purchaser has notice of their existence, and they may be of so stringent a character as to affect the validity of the transaction (as in *Dunn* v. *Flood*, 28 Ch. D. 586). This can hardly be applicable to a lease which must conform to the terms of the power, and the right to take which is very rarely offered for public competition.

By the Settled Land Act, 1882, s. 31, sub-s. 4, it is provided that "any preliminary contract under this Act for or relating to a lease shall not form part of the title or any evidence of the title of any person to the lease or to the benefit thereof."

Leases to give effect to predecessor's contract.

3. "The leasing power of a tenant for life extends to the making of a lease for giving effect to a contract entered into by any of his predecessors in title for making a lease which, if made by the predecessor, would have been binding on the successors in title" (S. L. Act, s. 12, sub-s. 1; and see S. L. Act, 1890, s. 6, which is said, however, not to extend to leases; (1892) 2 Ch. 213).

If in this sub-section the terms "predecessor in title" and "successor in title" are used as strictly correlative, the former term can include only the settlor; but the intention appears to be to include under "predecessors in title" not only the settlor but also all persons claiming through him antecedently to the tenant for life for the time being; and to include in "successors in title" all persons whose estates are subsequent to that of

the tenant for life for the time being (see Hood and Challis, p. 281).

Apart from the Act, it was held in *Davis* v. *Harford* (22 Ch. D. 128)—where real estates were devised in strict settlement and powers of granting building leases were given to the tenant for life, and to the trustees during the minority of any tenant in tail, and the tenant for life in pursuance of his power entered into a valid contract to grant a lease, but died without having executed the lease, and was succeeded by an infant tenant in tail—that the trustees had power to effectuate the contract of the tenant for life by executing a lease.

By s. 16 of 11 Geo. IV. & 1 Will. IV. c. 65, infants are empowered, with the sanction of the Court, to grant renewals of leases which the lessees are entitled to have renewed under covenant or agreement.

Contracts for leases by tenant for life.

4. "A tenant for life may contract to make any lease: and in making the lease may vary the terms with or without consideration, but so that the lease shall be in conformity with the Act" (Settled Land Act, 1882, s. 31, sub-s. 1 (iii.)).

"Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor; but so that it may be varied or rescinded by any such successor in the like case and manner, if any, as if it had been made by himself" (*ibid.* sub-s. 2; and see *Davis* v. *Harford* cited in the preceding section).

The Act (s. 7) provides that leases granted under the powers thereby given are to take effect in possession or within twelve months after their respective dates: and this is the usual provision in leasing powers created by will or settlement. As to notice to the trustees before leasing, see S. L. Act, 1882, s. 45, and S. L. Act, 1890, s. 7; *Mogridge* v. *Clapp*, (1892) 3 Ch. 382.

What contracts are good under statutory power.

5. It is submitted that under such a power a valid contract may be made to grant a lease commencing at any time within the twelve months: and that such contract if proper at the time of its execution, will be enforceable notwithstanding the death of the tenant for life or other intending lessor, and any inter-

mediate rise in the value of the land to be demised: but that if the lease is to commence at any time after the twelve months, the contract is not void, but cannot be enforced unless it complies with the terms of the power at the date when the lease is to commence, having regard to the value of the land to be demised and other circumstances as then existing (*Gaslight and Coke Co.* v. *Towse*, 35 Ch. D. 519), and unless the donee of the power who entered into the contract is still alive.

The last qualification is, it is submitted, a necessary consequence of the difference between relief by way of aid to defective execution and by way of specific performance. If the instrument creating a power of leasing by deed gives no power to enter into binding contracts for leases, any contract not under seal is a defective execution of the power; and relief must be sought in equity, either by way of aid to the defective execution, or by way of specific performance of the contract to grant the lease. If the defect be merely the want of a seal or the like, the relief will be by way of aid to the defective execution; but a contract such as that in *Gaslight Co.* v. *Towse* cannot be regarded as a defective execution, inasmuch as it is by hypothesis, at the time when it was entered into, in excess of the power. It can only be effectuated by way of specific performance; and this can only be had against the party contracting and persons claiming under him. It is therefore submitted that, although a contract to renew for a term beyond that permitted by the power may be specifically enforced, if the donee of the power is the same when the renewed lease is to be granted, and if the rent and covenants are then the best rent and the proper covenants, the equity is a personal one only against the contracting donee, and in no way binds the land, or operates to compel a subsequent owner or donee of the power to grant a lease in performance of the contract. If this were otherwise, the Court would enable a donee to bind not himself but the land for a period in excess of that expressly limited by the power; and there would be in effect no distinction between aiding defective execution and granting specific performance. "Every contract" in s. 31 sub-s. 2 of the Settled Land Act must be read as "every contract in conformity with this Act."

It is submitted that a lease to commence at a future time, although void in law as in contravention of a power to grant leases in possession, may be specifically enforced as a good contract in equity to grant a lease if the contracting lessor be alive and able to grant such a lease at the date when the term purports to commence, and if the rent and covenants be then the best rent and the proper covenants, on the same principle on which a lease for more than three years, though void at law if not under seal, may be enforced in equity as a valid contract (*Parker* v. *Taswell*, 2 De G. & J. 559; *Bond* v. *Rosling*, 1 B. & S. 371). The same result may also be arrived at by the assistance of 12 & 13 Vict. c. 26, s. 4 (*ante*, p. 351), the effect of which appears to be to give validity to a lease prematurely granted, but otherwise proper. Leases commencing *in futuro*.

6. It is submitted, although the authorities are not altogether consistent on the point, that trustees who have duties to perform in relation to land, have power to lease such land at least from year to year. It has been held that, where trustees have property vested in them upon trust for a tenant for life with remainders over, they are under an obligation, for the purpose of properly carrying out and performing their trust with regard to the property, to see that it does not fall into decay from want of proper repair (*Re Hotchkys*, 32 Ch. D. 408, 417). The most obvious and simple method of performing this duty is by letting to a tenant: and it is difficult to say what trustees who have no express powers of management and no express powers of letting can do with agricultural land, if they have no such implied power. It has recently been held that the Court has "an original jurisdiction" to authorize expenditure in management (*Conway* v. *Fenton*, 40 Ch. D. 512): but it may be doubted whether the Court can add to or alter the trusts of a will. It is suggested that the decision might be supported on an implication of power *ex necessitate rei*. The testator intended his property to be preserved until sale: it was impossible to sell: he must therefore have intended that expenditure to be made without which his paramount intention of having his property sold could not be effected; (see, too, *Re Jackson*, 21 Ch. D. 786; *Re De Teissier*, (1893) 1 Ch. 153). How far trustees without express power can grant leases.

By parity of reasoning it is submitted that the trustees in such a case would have power to let, at any rate from year to year, and probably for any reasonable period.

It has been held by the Court of Appeal in Ireland (*Fitzpatrick* v. *Waring*, 11 L. R. Ir. 35), that a trustee, in whom the legal estate is vested, and who has active duties to perform, may, without any express power of leasing, make a yearly or other reasonable letting of tenantable lands. In that case lands were devised to A. in fee, upon trust to raise 5,000*l.*, and pay the same to the trustees of B.'s marriage settlement, and subject thereto upon trust for B. for life, with remainder to B.'s children as she should appoint. B., in 1870, duly appointed the lands to her son C. in fee, subject to her own life interest, and died in 1877, whereupon the 5,000*l.* was paid off by C. In 1872, C. had purported to demise part of the lands to X. for thirty-five years; but in 1875, A. and B. brought an action of ejectment against C. and X., and recovered judgment; and shortly afterwards, A. leased the lands to Y. as yearly tenant. In 1878, X. resumed possession under a collusive judgment of ejectment against C. and Y.'s caretaker, and in 1879 assigned the residue of his term of thirty-five years to the plaintiff. Y., however, recovered judgment in ejectment against the plaintiff, and resumed possession. The plaintiff then brought an action in the Chancery Division in Ireland to have it declared that the lease of 1872 was valid and subsisting against the estate of C., and that Y. was a trustee for the plaintiff of any legal estate vested in him, on the ground that A. had no power to let the lands to Y. C. did not dispute the plaintiff's claim; but it was held that A.'s letting to Y. was valid, and that consequently the plaintiff's claim failed.

The Lord Chancellor (Law) says (p. 44), "What, it may be asked, is a trustee to whom the management of an estate has been committed to do with premises which become tenantless from time to time? If he cannot let them even to yearly tenants, as they were probably let before, must he undertake to farm them himself, and that at no little risk in many ways? Well, the answer given is, No, he need not assume such labour and

responsibility. His proper course is to seek the aid of the Court of Chancery, by which I presume is meant that he should institute an action here for administration and execution of the trusts imposed upon him. Well, putting aside the expense and inconvenience of having to take this course merely to let a farm, I would still venture to ask, if a trustee, as such, could not make any letting of even from year to year, however desirable and for the benefit of the trust, how is it supposed that the Court of Chancery could help him? In the exercise of its jurisdiction for the administration of trusts, this Court, I apprehend, has no power to make or authorize any leases or other dispositions of the trust property which the trustee could not have made himself. The Court in such a case, whether it assumes the place of the trustee, or guides him in the discharge of his duties, is still confined within the limits of the trust as constituted by its author, and has no authority to go beyond those limits. Its business is to *execute* the trusts, not to *alter* them."

Trustees for immediate sale ought not to let.

If there be an express trust for immediate sale, the trustees ought not to let unless it is absolutely impossible to sell; and this was all that was decided in *Evans* v. *Jackson* (8 Sim. 217), for the V.-C.'s statement that there might be circumstances to justify a lease shows that he did not consider a lease necessarily and absolutely *ultra vires*. See, too, *Drohan* v. *Drohan* (1 B. & B. 185), where a lease was set aside on the ground that all the beneficiaries, to the knowledge of the lessee before the lease was granted, desired an immediate sale. In *Naylor* v. *Arnott* (1 R. & M. 501), it was argued that the trustees (who had active duties to perform) were not justified in granting a lease for ten years, but it was admitted that they could lease from year to year; and it was held that they had power to lease for ten years; (and see *Middleton* v. *Dodswell*, 13 Ves. at p. 268; and *Micholls* v. *Corbett*, 34 B. 376; aff. 3 D. J. & S. 18). On the other hand, in *Wood* v. *Patterson* (10 B. 541), Lord Langdale held that the Court had no power to authorize a mining lease, and said, "As to *Naylor* v. *Arnott*, I should be afraid to act on it; for if the trustees unauthorized by the will have the power

of leasing for ten years, I see no reason why they have not power to lease for sixty." And in *Re Shaw* (12 Eq. 124), V.-C. Wickens said that *Naylor* v. *Arnott* was not a case to be followed. It is to be observed that *Re Shaw* was a special case asking the opinion of the Court on certain points, and that the V.-C. had already answered the first question by stating that the property ought to be sold with all convenient speed: no circumstances as to any necessity for postponing the sale or managing the property in the meantime appear to have been stated; and the V.-C. merely declined to answer the question whether the trustees had power to lease for any and what term.

Powers of leasing are "usual powers."

7. Powers of leasing appear to be "usual powers" within the meaning of a direction to make a settlement with all usual powers (*Hill* v. *Hill*, 6 Sim. 136; *Scott* v. *Steward*, 27 B. 367).

In *Duke of Bedford* v. *Marquis of Abercorn* (1 M. & C. 312), the articles contained a stipulation that the intended settlement, which related to estates in Ireland, should contain all the covenants, provisions, and conditions usually contained in marriage settlements in England. The Lord Chancellor directed a reference to inquire whether the powers of leasing proposed to be introduced were usual powers in the part of Ireland in which the estates were situated, and whether there were any circumstances connected with the property which might render it expedient and for the interest of all parties that such powers should be introduced, with liberty to state special circumstances.

Building lease where ordinary lease is specified.

But if leases for a particular term be mentioned, the Court will not infer from general words that larger powers were intended to be inserted.

In *Pearse* v *Baron* (Jac. 158), the articles provided that the settlement should contain a power of leasing for twenty-one years in possession, a power of sale and exchange, of appointing new trustees, and all such other powers, provisions, clauses, covenants, and agreements, as are usually inserted in settlements of a like nature. The Master of the Rolls held that the general words were of no effect as opposed to the mention of a particular term of years for which there was to be a power of granting leases, and he refused to allow the introduction of a

power to grant building leases for longer terms; (and cf. *Brewster* v. *Angell*, 1 J. & W. 625).

8. "A tenant for life may lease the settled land or any part thereof, or any easement, right, or privilege of any kind over or in relation to the same for any purpose whatever, whether involving waste or not, for any term not exceeding (i) in the case of a building lease ninety-nine years; (ii) in the case of a mining lease sixty years; (iii) in the case of any other lease twenty-one years" (Settled Land Act, 1882, s. 6). The principal mansion house on any settled land and the demesne thereof, and other lands usually occupied therewith are excepted from the power by s. 15, unless the consent of the trustees of the settlement or an order of the Court is obtained; and the Court has power to authorize a variation of the terms of building and mining leases according to the custom of the district (s. 10). Although s. 15 has been repealed by s. 10 of the Settled Land Act, 1890, the latter section enacts (sub-s. 2) that the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith shall not be leased without the consent of the trustees or an order of the Court: but provides (sub-s. 3) that where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not exceed together twenty-five acres in extent, the house is not to be deemed a principal mansion house. S. L. Act, 1882, s. 6.

It will be observed that the Act expressly authorizes a lease of an easement, right, or privilege; and by s. 2, sub-s. 10 (iv) a mining lease includes a grant or licence for any mining purposes. It has been held that a power to lease the premises or any part thereof, reserving the best yearly rent with a power of re-entry, &c., did not authorize a lease of part of the land, with liberty to sport over the rest: it was not a grant of the whole, for it contemplated that other parts were not leased; nor was it a grant of a part, for in the power part was used with reference to the entirety which the tenant for life had. Thus, supposing the estate to consist of two houses and one thousand Lease of easement.

acres, the power would enable the party to lease one house and one hundred acres. But the demise must be of the whole of the part demised; an easement cannot be granted by itself out of any separate part: that would be subjecting the land to a servitude (*Dayrell* v. *Hoare*, 12 A. & E. 356).

In *Jewel's case* (5 Rep. 3), it was held that a lease by a bishop of a fair, parcel of the possessions of the bishopric, was voidable by his successor, a fair being but a franchise or liberty out of which a rent cannot be reserved; and, therefore, for such rent the lessor and his successors have no remedy by distress; and all leases of such inheritances out of which the ancient and accustomed rents cannot be well and lawfully reserved are voidable by the Act 1 Elizabeth, c. 19. An argument to the same effect was urged in *Ricketts* v. *Bell* (1 De G. & S. 335), where the lease was of a way-leave; but the V.-C. does not refer to the point in his judgment, although he held the lease *ultra vires*.

What lands may be leased.

9. No lands can be leased under a power except such as are specified as subject to the power. The Settled Land Act authorizes a tenant for life to lease the settled land. It is conceived that this would not authorize a person, who happened to be life tenant under two different settlements with different remainders over, to grant one lease of lands subject to the two settlements (Hood and Challis, 274).

In *Tolson* v. *Sheard* (5 Ch. D. 19), two contiguous estates were devised to trustees upon trust for distinct *cestuis que trustent;* and by an order under the Settled Estates Act, 1856, they were authorized to grant mining leases with the consent of the respective tenants for life. The trustees and the two tenants for life entered into an agreement to grant one lease of the two estates at rents and royalties reserved as if the two estates were one, and there was to be one shaft for working the minerals under both estates. It was held by Hall, V.-C., and the Court of Appeal that the trustees had no power to grant such a lease of the two estates.

A lease which transgresses a power in this respect appears to be outside the provisions of 12 & 13 Vict. c. 26, and 13 Vict. c. 17, for, if the lands demised are not within the power, the

Acts have no application: their scope is to aid defects in the execution of, not to create new, powers.

Joining strange tenements at one entire rent.

10. It has been said that the mere joining of strange tenements at an entire rent is fatal to the lease (*Doe* d. *Lord Egremont* v. *Stephens*, 6 Q. B. 208). But this appears to be too widely stated. Lord St. Leonards (Pow. 810) lays down the following rules, which are supported by *Doe* d. *Douglas* v. *Lock* (2 A. & E. 705, 747), and *Campbell* v. *Leach* (Amb. 740; Co. Litt. 44 b.).

Rules laid down by Lord St. Leonards.

(i.) Where a rent is reserved according to the quantity or produce, as the tenth of the produce of every mine, or 40*s.* an acre, or the like, then although the demise is joint in terms, and part is not well demised, or is not comprised in the power, yet it shall hold good as to the lands within the power and duly demised.

(ii.) Where the ancient rent is required and that is reserved as an entire rent for the land within the power and more, the lease is bad as an execution of the power, not simply because it tends to destroy the evidence of the ancient rent, but because upon an apportionment the ancient rent would not remain for the land anciently let. In *Doe* d. *Bartlett* v. *Rendle* (3 M. & S. 99), the power was to let any of the lands limited by the settlement so as there was reserved the ancient rent. The donee of the power demised lands not anciently let (and held on that account not to be within the power), and lands previously let, at an entire rent, viz., that at which the latter had been previously let. This was held void: but here no rent at all was reserved for the land not previously let. Consequently, if there had been an apportionment, the ancient rent would not have been reserved for the lands anciently let. But if the ancient rents be reserved, two parts of the land, previously let separately, may be let together at one rent (*Doe* v. *Williams*, 11 Q. B. 688).

(iii.) Where the best rent is required, and the reservation, although of one entire rent for lands partly within the power and partly not subject to it, would upon an apportionment leave sufficient for the settled lands, so as to satisfy the terms of the power, it is still open to maintain that the lease may be sup-

ported as a due execution of the power. *A fortiori* will this be so, if there be not one entire reservation, but distinct reservations, although in the same deed. And it is submitted that the provisions of 12 & 13 Vict. c. 26, and 13 Vict. c. 17, would apply to such cases as these.

It has been held that where the power was to lease any part of the settled lands, reserving the usual and accustomed yearly rents, &c., part of the premises, formerly demised jointly with others at an entire rent, might be let at a rent bearing the same proportion to the old rent that the premises demised by the lease bore to the whole premises formerly demised (*Doe* d. *Lord Shrewsbury* v. *Wilson*, 5 B. & Ald. 363).

As to power of leasing mansion-house.

11. Powers of leasing in modern settlements commonly extend to all or any part of the settled property, although not infrequently the mansion house, gardens and park are excepted out of the power; and the 10th section of the Settled Land Act, 1890, forbids any lease of "the principal mansion house (if any) on any settled land and the pleasure grounds and park and lands (if any) usually occupied therewith," without the consent of the trustees of the settlement or an order of the Court. But the same section (sub-s. 3) provides that "where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section."

This sub-section settles a point of some difficulty which arose under the Settled Estates Acts and the Settled Land Act, 1882, s. 15, as to what constituted a principal mansion house. Those Acts applied to all settled estates great and small; but it could hardly be that a mere villa or dwelling-house became the "principal mansion house" simply because there was no other house on the property.

Lands usually demised.

12. Powers in deeds and wills often contain expressions which limit the extent of the power: thus, lands "usually demised" may mean either lands frequently let, referring to repeated acts of leasing, or lands usually in lease, which would refer to the

time during which the land had been let, and not to the acts of letting: either would appear to come within the meaning of lands usually demised (Sug. Pow. 728), although it has been said that lands which have been twice or thrice letten are within such a power, but lands once letten, though for a long term, are not (*ibid.*): and it would seem that the lands must have been in lease within twenty years previously to be within the power (*ibid.*, and see Co. Litt. 44 b).

Generality of power limited to carry out the intention.

The intention of the parties creating the power is in each case to govern; and general words may be limited accordingly. In *Baggot* v. *Oughton* (8 Mod. 259), there was a family settlement of an estate, consisting of grounds always occupied with the mansion, and of lands let to tenants on rents reserved; and there was a power to lease all or any part of the premises at such yearly rents or more, as the rents at which the same were then let. Lord Mansfield said that "the qualification annexed to the power of leasing, that the ancient rent must be reserved, manifestly excluded the mansion house and lands about it never let. No man could intend to authorize a tenant for life to deprive the representatives of the family of the use of the mansion house. The words in such a case show that the power is meant to extend only to what has been usually let. By that means the heir enjoys all the premises in the settlement, just as they were held by his ancestor, the tenant for life: he has the occupation of what was always occupied, and the rent of what was always let."

So in *Pomery* v. *Partington* (3 T. R. 665), a power to let all or any part of the premises so as the usual rents be reserved, did not authorize a lease of tithes which had never been let before; (and see *Mountjoy's case*, 5 Rep. 4).

When the power includes lands not before let.

If the intention be clear that the power should extend to premises not before demised, the Court will uphold a lease of such premises.

In *Waker* v. *Wakeman* (2 Lev. 150), there was a power to demise the settled premises, so as 5*s.* per acre rent were reserved: a lease of tithes comprised in the settlement was held good, although the restriction was inapplicable to the subject of the

demise; (and see *Comberford's case*, 2 Roll. Abr. 262, pl. 15; *sed qu.*; see these cases commented on, Sug. Pow. 734).

In *Winter* v. *Loveday* (1 Com. 41), Lord Holt says, "If a man hath a power reserved to him of making leases of two things, and a qualification is annexed to the power which cannot extend to one of these things, he may make a lease of that thing without any regard to the qualification;" and he instances the case of a power to lease a manor and every part thereof at such rent as was paid for two years before, and some lands were not let at any rents for two years before. It would be at any rate a clearer case if the power were to lease Blackacre and Whiteacre at the usual rents, and one had never been let: in such a case the express words would be too strong.

Joining or separating lands in leases.

Under a power to lease any part of devised lands "usually so leased" so that there be reserved "the ancient and accustomed rents and heriots or more," a single lease of lands comprised in the power, but which had never before been comprehended in one demise, was held good; the Court being of opinion that "usually so leased" related to the time and duration of the lease, not to the joining or separating the premises (*Doe* d. *Lord Egremont* v. *Stephens*, 6 Q. B. 208; *Doe* d. *Bartlett* v. *Rendle*, 3 M. & S. 99).

What will authorize a lease of mines.

13. A power to lease lands, without mentioning mines, authorizes a lease of open but not of unopened mines: a power to lease lands with the mines, authorizes a lease of open, but not of unopened mines, if there be any open mines; but if there be none, it authorizes a lease of unopened mines (*Clegg* v. *Rowland*, 2 Eq. 160).

This is a corollary of the general rule of law regarding waste, which is thus stated by Coke. "A man hath land in which there is a mine of coals or the like, and maketh a lease of the land (without mentioning any mines) for life or for years: the lessee for such mines as were open at the time of the lease made, may dig and take the profits thereof. But he cannot dig for

any new mine that was not open at the time of the lease made, for that would be adjudged waste. And if there be open mines, and the owner make a lease of the land, with the mines therein, this shall extend to the open mines only, and not to any hidden mine. But if there be no open mine, and the lease is made of the land together with all mines therein, there the lessee may dig for mines and enjoy the benefit thereof; otherwise those words should be void" (Co. Litt. 54 b).

"The limited owner's privilege of working the minerals is not confined in English law to open mines: it extends also to such mines as are expressly mentioned in the grant or demise. The reason of the doctrine is given in *Sander's case* (5 Rep. 12), that inasmuch as the mine is open at the time, &c., and he (the lessor) leases all the land, it shall be intended that his intent is as general as his lease is: *scil.*, that he shall take the profit of all the land and by consequence of the mines in it. In *Viner* v. *Vaughan* (2 Beav. 466), Lord Langdale thus expounds the principle:—On the general law there is no controversy; a tenant for life has no right to take the substance of the estate by opening mines or clay pits; but he has a right to continue the working of mines and clay pits where the author of the gift has previously done it; and for this reason, that the author of the gift has made them part of the profits of the land. In an earlier case (*Plymouth* v. *Archer*, 1 B. C. C. 159) Lord Thurlow lays it down that if a mine is already opened, the working of it is part of the annual profits, and the minerals are not then held to be part of the inheritance. There has been introduced into the law (says Lord Watson in *Campbell* v. *Wardlaw*, 8 App. Ca. 650) this qualification, that if the owner of the soil, the fiar, creates a mineral estate by working or letting a particular seam of minerals, he thereby brings the proceeds of the minerals so worked or let within the category of fruits and within the right of usufruct" (*per* Bowen, L. J., in *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 361; and see *Stoughton* v. *Leigh*, 1 Taunt. 402; *Dicken* v. *Hamer*, 1 Dr. & Sm. 284).

It is, however, a question of construction of the particular power in each case whether the mines to be demised are open mines only, or open and unopened alike.

In *Clegg* v. *Rowland* (2 Eq. 160), there was a conveyance to trustees of lands together with the mines thereunder, and a power to lease for fourteen years without mentioning mines, "so as none of the said demises or leases were made dispunishable for waste." This power was held to authorize a lease of open but not unopened mines.

Clause against waste rejected.

In *Daly* v. *Beckett* (24 B. 114), lands with the mines and minerals thereunder were conveyed to trustees in strict settlement, and power was given them to demise the hereditaments, and the coal and minerals, &c., but so as the lessees should not be made dispunishable for waste. The Master of the Rolls interpreted the power to be an express power to grant leases to work unopened as well as opened mines; but the terms of the prohibition were such as to prevent the lessee from committing waste, that is, from opening an unopened mine; he therefore concluded that there was so much contradiction in the clause which imported prohibition against waste, that he rejected it altogether; (and see *Morris* v. *Rhydydefed Colliery Company*, 3 H. & N. 473, 885; and *Campbell* v. *Leach*, Ambl. 740; *Re Ridge*, 31 Ch. D. 504).

It is to be observed, however, that tenant for life, impeachable for waste, of estates which are settled "with all mines, &c." cannot work unopened mines, although they are included in the general words, and there are no open mines (*Whitfield* v. *Benet*, 2 P. W. 240; and see *Re Barrington*, 33 Ch. D. 523).

What is an open mine.

Where a mine or quarry has been opened for a restricted or definite purpose, as to obtain fuel or the means to repair a particular tenement on the estate, that would not give a tenant for life, or other owner of an estate impeachable for waste, the right to work it for commercial profit. But when a mine or quarry is once open, so that the owner of the estate impeachable for waste may work it, the sinking of a new pit on the same vein, or the breaking ground in a new place on the same rock, is not *necessarily* the opening of a new mine or new quarry (*Elias* v. *Snowdon Slate Co.*, 4 Ap. Ca. 454; *Spencer* v. *Scurr*, 31 B. 334; *Clavering* v. *Clavering*, 2 P. W. 388).

Disused mine.

Whether a disused mine is an open or an unopened mine appears to depend on the purpose for which the mine was

disused, and whether such disuser was intended to be permanent or not; (see *Bagot* v. *Bagot*, 32 B. 509).

As to the mode of working mines leased under a power, and the weight to be attached to the custom of the country in determining it, see *Jegon* v. *Vivian* (6 Ch. 742).

Produce of mines belongs to tenant for life.

Where there is the ordinary power to lease mines and minerals, the produce of the mines is made part of the annual profits of the estate, and whether in royalties or in whatever other way it is produced, it forms part of those profits, and is not to be treated like timber cut, where the produce of it is invested, and the interest only paid to the tenant for life (*Daly* v. *Beckett*, 24 B. 123). Where, however, a testator having an absolute power of appointment gave the surface of the land to A., and the minerals to others, and under the Settled Estates Acts a lease of minerals had been previously granted, and a part of the rents reserved had been set aside and was in the hands of trustees to be invested under the Acts in the purchase of other lands, it was held that such rents were land and passed to A. (*Re Scarth*, 10 Ch. D. 499). It is the same with royalties on open brickfields (*Miller* v. *Miller*, 13 Eq. 263). As to timber, see *Honywood* v. *Honywood*, 18 Eq. 306; *Dashwood* v. *Magniac*, (1891) 3 Ch. 306; *Dunn* v. *Bryan*, 7 I. R. Eq. 143.

S. L. Act, 1882, s. 9.

The Settled Land Act, 1882, contains the following provisions as to mining leases:—

"Sect. 9.—(1.) In a mining lease—

"(i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf; and

"(ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any

subsequent specified period, free of rent other than the fixed or minimum rent.

"(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with mining purposes."

S. L. Act, 1882, s. 10.

"Sect. 10.—(1.) Where it is shown to the Court with respect to the district in which any settled land is situate, either—

"(i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term, or on other conditions than the term or conditions specified in that behalf in this Act, or in perpetuity; or

"(ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this Act, or except in perpetuity;

the Court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the Court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

"(2.) Thereupon the tenant for life, and, subject to any direction in the order of the Court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this Act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order."

S. L. Act, 1882, s. 11.

"Sect. 11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this Act, part of the rent as follows, namely,—where the tenant for life

is impeachable for waste in respect of minerals, three fourth parts of the rent, and otherwise one fourth part thereof, and in every such case the residue of the rent shall go as rents and profits."

This section does not apply to a mining lease granted by a tenant for life for giving effect to a contract entered into by a predecessor who was absolute owner (*Re Kemys-Tynte*, (1892) 2 Ch. 211).

And by s. 8 of the Settled Land Act, 1890, it is enacted as follows:— S. L. Act, 1890, s. 8.

"In a mining lease—

"(i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them:

"(ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period."

14. The Settled Land Act, 1882, s. 6, *ante*, p. 597, specifies the periods for which leases may be granted. Apart from the Act, if no term be mentioned, the general rules are as follows:— What term authorized.

> When a power is added to a life estate, the presumption is that the power is different from and in excess of that which would have arisen as a mere accessory to the life estate (*Hele* v. *Green*, 2 Roll. Abr. 261, pl. 10).

But the general intention to be gathered from the instrument creating the power is the criterion.

In *Vivian* v. *Jegon* (L. R. 3 H. L. 285), a testator devised his estates to his daughter for life without impeachment of waste, with remainders over. He gave her a power of leasing for twenty years, and also a power to work or make a lease of mines; the profits were to be paid over by his daughter to the

trustees, and invested in land, the rents to be received by the daughter for life. This power was held only to authorize leases terminable with the daughter's life. The grounds of the decision were, that the testator could not have meant to empower his daughter to make unlimited leases, amounting to sales, of minerals, when he had carefully provided for the sale of his estates generally by means of trustees; the words "work or lease," being placed together, were to be construed *in pari materiâ*, and the power to work must have been co-extensive with her life: the payment over by the daughter, the investment by her, and the payment of the rents to her, pointed to the duration of her life, and the testator had clearly specified the persons in remainder when he spoke of the power of exchange which was to continue beyond the daughter's life, and to be exercised with consent.

Indefinite power of leasing.

An indefinite power of leasing will usually allow of leases for any period, however long.

But in all cases, in order to determine what is the real meaning of the words of the power itself, it is competent to the Court to look to the whole instrument in which it is found, and to examine and consider the consequences to the remainderman and to the other objects of the deed, for the purpose, if the words be ambiguous, of adopting that construction of them which may produce the least inconvenience and best harmonize with all the other provisions which the parties have thought proper to make (*Sheehy* v. *Muskerry*, 1 H. L. C. 576). In that case the power was to lease all, every, or any part or parts, parcel or parcels of the premises, for any time or term of years or lives, and with or without covenants for renewal; and in case of the determination of all or any of the aforesaid lease or leases respectively, to make new or other leases thereof in manner aforesaid, and with or without any fine or fines, as the donee should think fit; this power authorized leases for 999 years, with fines; (see, too, *Taylor* v. *Mostyn*, 23 Ch. D. 583; *Re O'Brien*, 3 I. R. Eq. 77). In *Att.-Gen.* v. *Moses* (2 Madd. 294), a power

was given by Act of Parliament to a vicar, with consent of the vestrymen, to grant or demise certain waste ground as to them should seem meet. A lease for 999 years was upheld. There is, however, an exception to the rule that indefinite leasing powers will allow of leases for any term. In leases of charity estates, the Court considers whether there has been a prudent and provident execution of the trust, and if not, has held the lessee to be a trustee (*ibid.*; *Att.-Gen.* v. *Green*, 6 Ves. 452). It is in general laid down that when the trustees of a charity grant a lease of the property for a longer duration than is ordinarily consistent with its proper management, the lease will be set aside, unless the persons taking under it can show that it was, under the circumstances, a reasonable transaction (Tudor, Char. Trusts, 3rd ed. 260; *Att.-Gen.* v. *Pilgrim*, 12 B. 57; *Att.-Gen.* v. *Hall*, 16 B. 388; and see Charitable Trusts Act, 1855, s. 29; *Bishop of Bangor* v. *Parry*, (1891) 2 Q. B. 277).

Exception to last rule in case of charity lands.

If one hath power to make a lease for three lives or twenty-one years, he cannot make a lease for ninety-nine years determinable upon three lives; but where the power is in the beginning absolute, affirmative, and indefinite, and then a proviso is added, so that such lease shall not exceed three lives or twenty-one years, a lease for ninety-nine years determinable upon three lives may be made (*Whitlock's case*, 8 Rep. 69).

Power to lease for three lives or years.

A power to lease for any number of years not exceeding twenty-one years, or for the life or lives of any one, two, or three person or persons, so as no greater estate than for three lives be at any one time in being, authorizes either a chattel lease for years or a freehold lease for lives; but not a lease for ninety-nine years determinable on lives; for that might exceed twenty-one years (*Roe* d. *Brune* v. *Prideaux*, 10 East, 158).

In *Long* v. *Rankin* (Sug. Pow. 895), the power was to demise for any term or terms of years not exceeding thirty-one years, or for one, two, or three lives, or for any term of years not exceeding thirty-one years, or number of lives not exceeding three lives. This was well executed by a lease for three lives and the survivor of them, or for thirty-one years, which should longest continue. In this case the term did not exceed that

authorized by the power; (and see *Commons* v. *Marshall*, 6 Br. P. C. 168).

In *Re Crommelin* (1 Ir. C. L. 182), a power to lease for any term not exceeding three lives *and* forty-one years was well executed by a lease for three lives and forty-one years, commencing from the 1st of November preceding the death of the survivors of the three lives.

But where the power was to lease all or any part of the premises then let on leases for lives to any person for a similar term or estate, and at the same rents and under the same covenants at and under which the leases were then held, and part of the premises was let for two lives at the date of the creation of the power, a lease for three lives was held bad (*Jenner* v. *Morris*, 7 Jur. N. S. 385; 9 W. R. 566).

Power to lease for 21 years authorizes a lease for a smaller term.

Inasmuch as *omne majus continet in se minus*, a power to lease for twenty-one years will authorize a lease for any term of years not exceeding twenty-one. The tenant for life may exercise his right to the utmost of his power, or he may stop short of that; and then every part of which he abridges himself will be for the benefit of the next in remainder: he throws back into the inheritance that portion which he did not choose to absorb for his own use (*Isherwood* v. *Oldknow*, 3 M. & S. 382). And he that has power to make leases for three lives may make leases for two lives; in either case he may create a less interest, *being of the same nature*, than the power mentions (Sug. Pow. 746).

When lease may be determinable at lessee's option.

A power to lease for any term of years not exceeding twenty-one years authorizes a lease determinable at the option of lessor or lessee (*Edwards* v. *Milbank*, 4 Drew. 606; and cf. *Sheehy* v. *Muskerry*, 1 H. L. C. 589), although a contrary opinion has been expressed in Ireland (*Lowe* v. *Swift*, 2 B. & B. 536; *Jack* v. *Creed*, 2 Hud. & Br. 128).

But if the power requires that the lease should be for a term *absolute* not exceeding twenty-one years, a lease determinable at the option either of lessor or lessee seems to be not within the power (Sug. Pow. 738).

In *Muskerry* v. *Chinnery* (Ll. & Goo. 229), Lord St. Leonards says: "Where the transaction is *bonâ fide*, and the *terms of the power do not require the number of years to be absolute*, I see no

reason for holding that a clause of surrender vitiates the lease. Many powers do require that the term to be granted shall be an absolute one—that is, *not determinable*.

Lease for lives.

A lease under a power to lease for lives must be for lives *in esse*, and concurrent; in Lord Kenyon's words, the candles must be all burning at the same time (*Doe* d. *Wyndham* v. *Halcombe*, 7 T. R. 713). In *Clark* v. *Smith* (9 Cl. & Fin. 126), the power was for A. and all and every other person to whom any use was thereby limited, to demise the lands for any number of lives or years, consistent with their respective interests therein, in possession, without fine, &c. This did not warrant a lease for three lives, with a covenant to put in a new life on the failure of any of the three, on payment of a fine.

But a power to grant leases for two or more lives implies an authority to grant them during the life of the survivor, although the power is silent in that respect (Sug. Pow. 744; *Alsop* v. *Pine*, 3 Keb. 44).

Defects of this nature—*i. e.*, in respect of the duration of the term—will fall within the provisions 12 & 13 Vict. c. 26, and 13 Vict. c. 17.

Leases in possession and reversion.

15. "Every lease shall be by deed and be made to take effect in possession not later than twelve months after its date" (Settled Land Act, 1882, s. 7, sub-s. 1; and see *ante*, pp. 591, 592).

A lease in reversion under such a power is not a good execution of the power (Sug. Pow. 752; *Opy* v. *Thomasius*, 1 Lev. 167).

It appears not to have been expressly decided whether the fact that the land is in lease at the date of the creation of the power is sufficient to show an intention to permit the grant of leases in reversion: but it seems to be the better opinion that it would not (Sug. Pow. 749, 750, 764).

What is a lease in reversion.

A lease in reversion is either a lease of a reversion on the determination of a prior estate, or is a lease *in futuro*. In the latter case, it may either be to commence at a future day, but subject to the determination of a prior estate; or it may be of a reversion to commence on a future day simply, without reference to any prior estate; but, as a general rule, powers to lease in

reversion are construed to mean leases to commence from the determination of existing leases, and not leases to commence generally at any future period.

Distinction between leases in reversion and leases *in futuro*.

There is an important distinction between leases of a reversion and leases *in futuro*. A *chattel lease* (*i. e.*, for years) may be granted pending a prior subsisting one, provided it be within the limits of the power, and provided it give no beneficial interest during the continuance of the subsisting lease; but so long as there is a subsisting *freehold lease in esse*, a second freehold lease cannot be granted. The right of granting a second chattel lease was settled in *Read* v. *Nashe* (1 Leo. 147), and is recognized as law in *Goodtitle* v. *Funucan* (2 Doug. 572); but a second freehold lease cannot be granted, because it must be to take effect *in futuro*, and a freehold cannot be conveyed unless it is to take effect *in præsenti* (*per* Lord Ellenborough, 10 East, 184; and cf. *Jenner* v. *Morris*, 7 Jur. N. S. 385; 9 W. R. 566).

Lord Holt says (1 Com. 39) that the expression to lease in reversion has a different signification in the same conveyance, when applied to leases for lives in reversion, from that which it bears when applied to leases for years. For as a lease for lives cannot, strictly speaking, be made to commence *in futuro*, it will in that case be intended of a concurrent lease or a lease of the reversion; that is, of lands then in lease, to commence in possession after the determination of the then existing lease, though it commences in interest presently, and is concurrent with the existent lease.

Leases in reversion not within 12 & 13 Vict. c. 26, and 13 Vict. c. 17.

Leases in reversion under powers which allow only leases in possession, do not fall within the provisions of 12 & 13 Vict. c. 26, and 13 Vict. c. 17, unless the donee of the power continued in the ownership until he could lawfully grant such leases (s. 4), and the lessee entered; for the statute requires (s. 2) that the lessee should have entered under his lease, and this he could not do while his term was reversionary. But it seems that a lessee who has given up an old lease, and continues in possession under a new one, has entered (*Moffett* v. *Lord Gough*, 1 L. R. Ir. 331).

16. "Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case" (Settled Land Act, 1882, s. 7, sub-s. 2; *Re Chawner*, (1892) 2 Ch. 192). Best rent to be reserved.

"A fine received on the grant of a lease under any power conferred by the Act of 1882 is to be deemed capital money arising under that Act" (Settled Land Act, 1884, s. 4). The provisions as to the application of capital money are ss. 21 *et seq.* of the Act of 1882. Fine, how far permissible.

A tenant for life granting a lease under the Acts may therefore require the payment of a fine. This is contrary to the law as existing independently of the Act, for the acceptance of a fine is fatal to a lease under an ordinary power to lease at the best rent. It is to be observed, however, that the fines taken by lessors in such cases are retained by themselves for their own benefit: the Acts provide for the capitalisation of the whole of the fines authorized by them. This appears unfair to the tenant for life and therefore impolitic, because it will prevent the taking of fines—a proceeding which appears not merely unobjectionable but highly advantageous to landlords by securing their rent. The fine is merely the purchase-money of the land for a term of years (*Shepheard* v. *Betham*, 6 Ch. D. 597), paid in advance instead of being spread over a number of years as rent: the same principle, therefore, which is applied to the purchase-money of leaseholds under the 34th section of the Settled Land Act, 1882, and the 74th section of the Lands Clauses Consolidation Act, 1845, would appear to be fairly applicable to fines.

It must not be assumed, however, that a lessor under an ordinary power in a deed or will can justify the acceptance of a fine by investing it as capital, and appropriating the income only as rent. Even if the words usually found in such powers ("without taking anything in the nature of a fine or fore-gift") could be construed as meaning "taking for his own exclusive benefit," the cases hereafter mentioned show that such a lease would be bad on other grounds.

Criterion of best rent.

17. The power usually provides for the reservation of the best rent; but, even without such a provision, a lease at an undervalue would probably be void, as not being within the intent of the power.

There is but one criterion which our Courts always attend to as a leading criterion in discussing the question whether the best rent has been got or not; that is, whether the man who makes the lease has got as much for others as he has for himself. If he has got more for himself than for others, that is decisive evidence against him (*Montgomery* v. *Wemyss*, 5 Dow. 293, 344).

Not necessarily the highest.

But the lessor is not bound to accept the person who offers the highest rent (*Doe* d. *Lawton* v. *Radcliffe*, 10 East, 278). In that case the Court said that, where the transaction was fair and no fine or other collateral consideration was taken by the tenant for life leasing under the power, or injurious partiality shown by him in favour of the particular lessee, there ought to be something extravagantly wrong in the bargain in order to set it aside on this ground; for in the choice of a tenant there were many things to be regarded besides the mere amount of rent offered; (and see *Dyas* v. *Cruise*, 2 J. & L. 460).

Definition of rent.

Rent is defined by C. B. Gilbert to be an annual return made by the tenant, either in labour, money, or provisions, in retribution for the land that passes.

In *Campbell* v. *Leach* (Ambl. 740), and *Basset* v. *Basset* (*ibid.* 843), ore was held analogous to money, and a good reservation of rent; but it may, perhaps, be doubted whether any but a money rent could be safely reserved under the ordinary power at the present day.

Distress by remainderman.

Rent reserved on a lease is rent properly speaking, and the remainderman can distrain for it (Co. Litt. 214, a., citing *Harcourt* v. *Pole*, 1 And. 273).

Must be reserved specifically.

The best rent must be ascertained and specifically reserved: it is not enough to follow the words of the power and reserve "the best rent" (*Orby* v. *Mohun*, 2 Vern. 531, 542). So, too, if the ancient rent be required, it is not enough to reserve "the ancient rent" (*ibid.*).

Fines.

If a fine is taken, it is clear that the rent cannot be the best

rent; for however much it may be, the lessee would have given more if he had not had to pay the fine. And it seems that taking a fine is contrary to a prohibition against diminishing the rental of an estate (*Montgomery* v. *Wemyss*, 5 Dow. 293).

Power to grant leases in possession.

18. Under a power to grant leases in possession, neither a lease in reversion expectant on the determination of an existing lease, nor a lease to commence simply *in futuro*, can be granted. If it be made to commence only a day after the deed creating it, it is as fatal a variance from the power, at law, as if made to take effect at the expiration of one hundred years from the time (Sug. Pow. 752; *Doe* v. *Calvert*, 2 East, 376). The rule is said by Lord St. Leonards to be the same in equity (*ib.* 760); but this must be subject, it is submitted, to the qualifications suggested above (p. 591, 592), and to the Acts 12 & 13 Vict. c. 26, and 13 Vict. c. 17; (and see *Pollard* v. *Greenvil*, 1 Rep. in Ch. 98).

It seems that a lease for three years, and so from three years to three years, makes but one term of six years (*per* Bridgeman, C. J., 1 Lev. 46).

Although all leases, where there is a particular estate out, are leases in reversion, it has been held that where there was a power to grant leases in possession, but not by way of reversion or future interest, a lease *per verba de præsenti* is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will or from year to year, if at the time they received directions from the lessor to pay their rents to the lessee (*Goodtitle* v. *Funucan*, 2 Dougl. 565). The decision rested on three grounds: (1) that the tenants agreed to the lease and surrendered their possession before the execution of it, in order to make it valid (Lord St. Leonards thinks this the true ground: Pow. 762). (2) That if the jury had not found the defendant to be in possession, still the lease would have been good as a concurrent lease. (3) That all the subsisting leases were leases at will; there was no outstanding lease as against the remainderman: he would not have been bound to give the tenants notice to quit, but might have entered upon them immediately.

Principle governing the construction

In considering particular phrases, the principle laid down by Lord Manners in *Dowling* v. *Foxall* (1 B. & B. 196) should be

of doubtful phrases.

remembered—that the Court in a doubtful case will reject that construction by which a right would be divested or a forfeiture incurred.

Accordingly, a lease to take effect "from henceforth," or "from the time of delivery," is a lease in possession, and shall commence from the delivery, when no time is mentioned (*Clayton's case*, 5 Rep. 1; Co. Litt. 46, b.); so, too, "from the day of the date" (*Pugh* v. *Duke of Leeds*, 2 Cowp. 714), although, in general, terms of years last during the whole anniversary of the day from which they are granted (9 Ad. & E. 894).

As a deed takes effect from its delivery, not from its date, a lease, which by its date purports to commence *in futuro*, will be supported if it be shown to have been delivered at such a time as to make it take effect in possession. In *Doe* d. *Cox* v. *Day* (10 East, 427), the lease was dated 17th February, 1802, *habendum* from the 25th March then next; but it was not executed and delivered until the 27th April. It was held good.

Surrender may be presumed.

19. In order to support a lease as in possession a surrender of an existing lease has been presumed (*Goodtitle* v. *Funucan*, 2 Dougl. 565; and cf. *Lefroy* v. *Walsh*, 1 Ir. C. L. R. 311); and equity has relieved against the want of such a surrender (*Campbell* v. *Leach*, Amb. 740). If the new lessee is himself the tenant under the existing lease, his acceptance of the new lease, if effectual, operates at law as a surrender of the old lease. But the acceptance of a lease, purporting to be granted in exercise of a power, but void for non-compliance with the terms of such power, is not a surrender of a valid subsisting lease; for, if the surrender is intended for a particular purpose, and that purpose—the only motive for it—fails, the surrender also fails (*Davison* v. *Stanley*, 4 Burr. 2210; *Wilson* v. *Sewell*, *ib.* 1974; *Zouch* v. *Parsons*, 3 *ib.* 1794; *Roe* v. *York*, 6 East, 86). And the rule is the same where the surrender is made by the act of the parties and not merely by operation of law, if it appear clearly that the parties intended that the surrender should be made in consideration of the new lease, and should be conditional on the non-avoidance of such new lease (*Doe* d.

Egremont v. *Courtenay*, 11 Q. B. 702, 712, overruling to some extent *Doe* d. *Egremont* v. *Forwood*, 3 Q. B. 627). The foregoing statement applies only to a new lease of the premises commencing at once: a new lease of the premises for a further and additional term after the subsisting term is of course reversionary (*Doe* v. *Carter*, 5 T. R. 567; 6 Br. P. C. 175; and see *Doe* v. *Calvert*, 2 East, 376; *Roe* v. *Prideaux*, 10 East, 158).

20. If the new lessee has granted underleases during the term which he surrenders, it is submitted that the provisions of 4 Geo. II. c. 28, s. 6, give validity to the new lease, notwithstanding the continued existence of outstanding underleases. That section provides as follows:— 4 Geo. 2, c. 28, s. 6.

"And whereas many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several undertenants: And whereas many of those leases cannot by law be renewed without a surrender of all the underleases derived out of the same, so that it is in the power of any such undertenants to prevent or delay the renewing of the principal lease, by refusing to surrender their underleases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords, the first lessees. For preventing such inconveniences, and for making the renewal of leases more easy for the future, be it enacted, that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the underleases, be as good and valid to all intents and purposes as if all the underleases derived throughout had been likewise surrendered at or before the taking of such new lease, and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her, or their executors and administrators, shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof, and the underlessees shall hold and enjoy the messuages, lands and tenements in the respective underleases comprised, as if the original leases, out of which the respective underleases are derived, had been still kept on foot and con-

tinued, and the chief landlord and landlords shall have and be entitled to such and the same remedy, by distress or entry in and upon the messuages, lands, tenements and hereditaments comprised in any such underlease, for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such underlease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective underleases had been renewed under such new principal lease, any law, custom or usage to the contrary hereof notwithstanding."

And as to the power of the Court to protect underlessees on forfeiture of the superior leases, see Conveyancing Act, 1892, ss. 4 and 5.

If the power is to lease for a given number of years, without specifying any period of commencement, the term ought to begin at once and not *in futuro* (*Leaper* v. *Wroth*, 6 Rep. 33, a.; *Lady Sussex* v. *Wroth*, Cro. Eliz. 5; *Leslie* v. *Crommelin*, 2 I. R. Eq. 134); although it will of course be otherwise if an intention to allow leases in reversion can be collected from the terms of the instrument creating the power (*Coventry* v. *Coventry*, Sug. Pow. 753).

Power to grant leases in possession and in reversion.

21. It has been said that a power to grant leases in reversion as well as in possession does not authorize a lease in possession and another in reversion of the same land; but that the power to grant leases in reversion must be confined to such parts of the land as were not then in possession (1 Com. 39). But this seems open to question; for, if under such a power a lease be granted in possession, and a year, or even a week after, another lease be granted to commence after the expiration of the former, this would be within the power; and if so, there appears to be no reason why the two should not be granted together (Shep. Touch. 270 n.).

In *Doe* d. *Sutton* v. *Harvey* (1 B. & C. 426), the donee of a power of leasing, either in possession or immediately on the determination of leases then subsisting, granted two leases of the same premises, both executed on the same day; the one

dated 4th May, 1787, *habendum* for thirty years from 1791 when an existing lease expired; the other dated 4th June, 1787, *habendum* for sixty-three years from 1821. A smaller rent was reserved on the second lease in consideration of a covenant to rebuild by the tenant. This lease was held bad, but on the ground that it was a bungling contrivance to throw the cost of rebuilding on the remainderman.

Concurrent leases.

22. It seems the better opinion that concurrent leases—that is, leases to commence *in præsenti*, but only taking effect in possession after the determination of a subsisting lease—are not leases in possession.

In a note to Sheppard's Touchstone, 8th ed. 270, the learned editor says: "Under a power which requires that leases under it should be granted in possession, it is not sufficient, it is conceived, that the term is made to commence *in præsenti* or immediately; but in order to constitute a lease in possession within the true meaning of the power, the lessee should have immediate possession of the property. There are, however, authorities which countenance the opinion that, if the term is made to commence immediately, the lease will be good, notwithstanding there may be a prior lease in existence." In *Goodtitle* v. *Funnean* (2 Dougl. 565, *ante*, p. 615, 2nd point), Lord Mansfield said: "For this, *Read* v. *Nashe* (1 Leon. 148), was cited, where under a proviso to grant leases only for twenty-one years a lease had been granted in 4 Ph. & M. for twenty-one years, and afterwards (18 Eliz.), a year before the expiration of that lease, another was granted of the same premises for twenty-one years to begin presently, and it was held that the second lease was good. The reason given is a strong one—viz., that the inheritance was not charged in the whole with more than twenty-one years. No authority was cited against this case, nor any answer given against the reasoning in it." Lord St. Leonards, however, points out that the case was not decided on this point; for after the first lease was granted, a fine was levied, and it was determined that it was a forfeiture by the tenant for life, and therefore the second lease was void. And see his argument against concurrent leases (Pow. 768—777).

Moreover, if the best rent were required to be reserved, and the rent reserved by the concurrent lease is greater than that reserved by the prior lease, this is on the face of it evidence that the rent is not the best; for if the concurrent lessee pays money out of pocket before he comes into possession (as he must do if he pays more than he receives from the lessee in possession), such payment is in the nature of a fine; if he had not had to pay it, he would clearly have given a higher rent.

In Davidson, v. 279, a form is given of a concurrent lease granted under a power which authorized the reservation of an increased rent to commence *in futuro*. It is there said (281 n.), that it admits of considerable doubt whether a reservation of rent of this nature would not invalidate a lease granted in pursuance of the ordinary power requiring the best rent to be reserved, as upon the very face of the lease it would appear that the best rent was not reserved from the commencement of the term; and that where, in the absence of special authority, the concurrent lease reserves an increased rent co-extensive with the term granted, the proper course to adopt appears to be, to reserve the maximum rent in the first instance, and to add a proviso that, during the continuance of the original lease, the excess only should be receivable under the concurrent lease.

Surrender of existing lease.

23. Apart from the Settled Land Acts it is difficult to say that the best rent is obtained if the lease is granted in consideration of the surrender of an existing beneficial lease, for the rent must be diminished to the extent of the value of the surrendered lease. But if the lease were at a rack rent, the same objections would not arise (Sug. Pow. 787; and see *Re Rawlins*, 1 Eq. 286).

The 7th section of the Settled Estates Act, 1877, authorizes the surrender of leases either for the purpose of obtaining a renewal of the same or not, and extends the power given by the Acts to all or any part of the surrendered premises. It is conceived that this section, although general in terms, applies only to surrenders for the purposes of the Act. But if this is not so, the power can hardly extend to more than the authorization of

a complete legal surrender, and cannot alter the meaning of a power to lease at the best rent.

Under the Settled Land Act, 1882, the tenant for life has wider powers. The 13th section of that Act provides that:— S. L. Act, 1882, s. 13.

"(1) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this Act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals or any of them.

"(2) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

"(3) On a surrender the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

"(4) A new or other lease may comprise additional land or mines and minerals, and may reserve an apportioned or other rent.

"(5) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

"(6) Every new or other lease shall be in conformity with this Act."

And by s. 31, sub-s. 1 (iv.), it is provided that "a tenant for life may accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted." S. L. Act, 1882, s. 31.

It has been suggested that the consideration authorized by

s. 13 may be payable by or to the tenant (Hood and Challis, p. 283): but it seems rather a perversion of language to say that a tenant for life who pays a lessee to go out "accepts with consideration a surrender" of his lease. And the Act contains no provision for raising the consideration money, if payable by the lessor. The Act also omits to provide for the destination of the consideration paid by the lessee; and it appears the better opinion on the construction of the Act that it must be treated as capital money, although, in justice, the tenant for life ought to be entitled to apportioned payments under s. 34 (*ante*, p. 613).

Covenant to lay out money in improvements.

24. Apart from the Settled Land Act, 1882, which expressly provides that the best rent is to be reserved, "regard being had to any money laid out or to be laid out for the benefit of the settled land" (s. 7, sub-s. 2, and see ss. 8 and 9), it seems that improvements by the tenant, or a covenant to lay out money on improvements, will not authorize a lease at less than the best rent (*Roe* d. *Berkeley* v. *Archbishop of York*, 6 East, 86). And if any consideration is given by the tenant over and above the rent, the inference is strong, but not necessarily irresistible, that without the further consideration he would have given more rent. For the purposes of stamp duty, it has been held that a covenant to complete houses is "a further or other valuable consideration" besides the rent within 17 & 18 Vict. c. 83, s. 16 (*Re Bolton*, L. R. 5 Ex. 82; but see now Stamp Act, 1891, s. 77). But this is not conclusive, because it may well happen that the buildings on a farm are so insufficient or defective that no tenant would take the property at any rent unless he is authorized to build or rebuild as the case may require. In *Shannon* v. *Bradstreet* (1 S. & L. 52) Lord Redesdale thought that such improvements, or covenant to lay out money as above mentioned, would not be sufficient to avoid the lease, if the rent were the best that could be got, that is to say, that the covenant to lay out money on improvements did not necessarily show that the rent was less than could have been obtained. As to this, Lord St. Leonards says (Pow. 780) that although the rent reserved be the full value of the land, yet if satisfactory evidence could be produced to a jury that a tenant was willing to give an additional rent in lieu

of the money agreed to be laid out in improvements, the lease could not be supported. It would not be the best rent that could have been obtained. In these cases, it is not necessary that there should be fraud and collusion between the lessee and the tenant for life. The simple question is, Is the rent the best rent? If it be not, the lease must fall to the ground, however fair the transaction; (and see *Doe* d. *Griffiths* v. *Lloyd*, 3 Esp. 78).

In *Doe* d. *Bromley* v. *Bettison* (12 East, 304), a lease was upheld, although the lessor undertook the repairs of the mansion-house, and covenanted that if he did not repair within three months after notice, the tenant might do so and deduct the expenses from the rent; and although the lessor covenanted, in consideration of a large sum to be laid out by the lessee in repairs, to renew on the same terms. As to the first objection: if the tenant is to keep the premises in repair, the rent is so much less; if the landlord be to repair, the rent is so much greater. It was a question for the jury whether, taking into consideration the repairs to be made by the landlord, the rent was a fair one.

In *Price* v. *Assheton* (1 Y. & C. Ex. 82), Lord Lyndhurst said that another question of some nicety arose, namely, whether, although money was to be laid out by the lessee, and the rent to be estimated by the valuers without reference to the money so to be laid out, that was within the terms of the power? *Primâ facie*, a rent so reserved is not an improved rent; but in that case it was stipulated that the improvements should be made by the tenant, in consideration of the new lease. He also said during the argument, "If it be worth the tenant's while to pay rent and also to make improvements, it shows that the rent taken by the landlord is not the most improved rent;" (and see *Doe* d. *Rogers* v. *Rogers*, 5 B. & Ad. 755).

Rent and heriot and condition for re-entry.

25. A power which required the reservation of a fixed rent and a heriot, and of a condition for re-entry for breach of covenants, was held not well exercised by a lease which reserved a much larger rent but no heriot, and contained no condition for re-entry (*Doe* d. *Lord Egmont* v. *Hellings*, 6 Jur. 821, and *Doe* d. *Lord Egremont* v. *Grazebrook*, 4 Q. B. 406).

Usual rent.

Although, perhaps, "usual" may in most cases be equivalent to "most" (4 M. & S. 378), it will be otherwise if it be used in contra-distinction to "best" or "most."

In *Doe* d. *Newnham* v. *Creed* (4 M. & S. 371), a testator gave A. a power of leasing lands in Sussex for twenty-one years at the most rent, and lands in Middlesex for sixty-one years at the usual or other the most rent. At the testator's death, the property in Middlesex was let at a small rent, a fine having been taken. It was held that A. might demise it at a slightly higher rent, taking a fine. In this case there were two descriptions of property—that which lay in Sussex, for which the testator provided that the most rent should be reserved, as upon an agricultural lease; and that which lay in Middlesex, for which the usual or other the most rent was to be reserved. This was intended to secure the remainderman as much as before, but also to allow the lessor to take a fine; for this had been done before. Importance was also attached to the variation of phrase in the same instrument as to the reservation of rent.

Ancient rent.

Powers used formerly to require the reservation of the ancient rent: this is now seldom, if ever, done. Where such a term is introduced, the better opinion is that, as a general rule, the rent reserved at the time of the creation of the power, where a lease was then in being, or the last before it, where no lease was then in being, is the rent to which the power must be taken to refer (Sug. Pow. 790; and *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705; *Roe* d. *Brune* v. *Rawlings*, 7 East, 279; *Doe* d. *Lord Egremont* v. *Grazebrook*, 4 Q. B. 406). In *Doe* d. *Biddulph* v. *Hole* (15 Q. B. 848) it is laid down that, although the latest lease preceding the creation of the power is entitled to greater weight than any single earlier lease, and ought to govern the decision when there is a balance of evidence, yet when the ancient custom appears to have been uniform, and a single lease varying therefrom was granted just before the creation of the power, the exceptional lease ought not to govern merely because it is the latest.

Rent should be uniform.

But whatever rent is reserved should be reserved during the continuance of the whole term at an uniform rate. In *Doe* d.

Sutton v. *Harvey* (1 B. & C. 426), the donee of a power of leasing which required the reservation of the best rent, demised for two terms at one and the same time, the first for thirty years from 1791, the other for sixty-three years from 1821: the rent reserved on the first lease was 270*l.* per annum, that on the second was 120*l.*, but it contained a covenant to rebuild. The lease was held bad, partly on the ground before mentioned, that a lease in possession and a lease in reversion of the same premises could not be granted at the same time, but chiefly because the best rent was not reserved throughout the term granted by the second lease; (and see *Mountjoy's Case*, 5 Rep. 4, s. 6).

Rent now accrues from day to day, and is apportionable in respect of time accordingly (33 & 34 Vict. c. 35). Before that statute it was to the advantage of the remainderman that the rent should be reserved at long intervals, as he thereby had the chance of obtaining the rent which accrued during a period when the tenant for life had been in possession. It was, however, determined that a yearly rent might be reserved and made payable yearly, half-yearly, or quarterly. It means a rent payable within each year, not merely payable at the end of each year: in every year, as long as the lease endures, a yearly rent is to be reserved and made payable. This was decided in *Rutland* v. *Wythe* (10 C. & F. 419), where the Lords concurred in the opinions of the majority of the judges and upheld a lease for twenty-one years, from 11th October, 1833, at the yearly rent of 903*l.*, payable by half-yearly payments on the 6th April and 11th October in each year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st August next before the determination of the said term. The provision was clearly a reasonable one, and was within the terms of the power; (and see *Doe* d. *Lord Shrewsbury* v. *Wilson*, 5 B. & Ald. 363; *Fryer* v. *Coombs*, 11 A. & E. 403). Baron Rolfe in *Rutland* v. *Wythe* (10 Cl. & F. 432) said that a lease in which each year's rent is reserved on the first day of the year would be within the power, if a jury could find, what they had found in that case, but perhaps could not in the case suggested, that the

Yearly rent.

rent so reserved was the best rent that could be reasonably obtained (Sug. Prop. II. of L. 502); and in *Booth* v. *A'Beckett* (9 L. T. N.S. 68 (P. C.)) where, under a power which required the reservation of the best yearly rent without fine, a lease was granted for twenty-one years at a yearly rent, but five years' rent was to be paid in advance, the lease was held bad.

Half-yearly rent.

As a yearly rent must be reserved and made payable in every year of the term, so a half-yearly rent must be reserved and made payable in every half-year of the term: and moreover, it seems that such a rent must be reserved at *equal* half-yearly intervals, or, at all events, on days which by the custom of the country are treated as half-yearly days of payment (*Doe* v. *Morse*, 2 C. & M. 247). In that case the term commenced on the 4th of January, and the rent was payable on the 1st of May and the 29th of September in each year: this was held bad, on the ground that the inequality of the intervals between the payments might have been injurious to the remaindermen.

Payment in advance.

And not only may the last half-year's rent be made payable in advance, as in *Rutland* v. *Wythe*, but a stipulation that the first half-year's rent, which is reserved on fixed days throughout the term, should be paid on the first of such days, is good, although a full half-year will not have then elapsed.

In *Isherwood* v. *Oldknow* (3 M. & S. 382), a yearly rent was required to be reserved; the lease was granted on the 15th of October, and by stipulation of the parties, payment of a half-year's rent became due on the 11th November following: this was upheld; (and see *Doe* d. *Hopkinson* v. *Ferrand*, 20 L. J. C. P. 202; *Doe* v. *Wilson*, 5 B. & Ald. 363).

Incident to the reversion.

26. The power usually provides that the rent shall be incident to the immediate reversion; but it is not necessary in order to fulfil this requirement, that the reservation should be expressly to the tenant for life and after his death to the person or persons entitled to the reversion and inheritance of the premises under the instrument creating the power. For the lease has not its essence from the estate of the lessor, but from the instrument out of which the lessor's estate is derived, and in construction of law it precedes the estate for life and all the remainders; for

after the lease made, it is as much as if the use had been originally limited to the lessee for a term, and then the other limitations in construction of law follow it (*Whitlock's case*, 8 Rep. 71, b.). The reservation, therefore, is the creature of the power, and transferred with the subsequent limitations; it is virtually made by the person out of whose estate the power was first created, and virtually the assignment comes from him; it is not strictly an assignment from the person who signs the lease, but from the person out of whose estate the lease was to have its essence and operation (3 M. & S. 396).

Reservation to lessor and his heirs;

Thus, when the lessor reserves rent to himself and his heirs, it is good; for that, by construction of law, precedes the limitations of the uses, and then it being well reserved, it is well transferred to everyone to whom any use is limited (*Whitlock's case*, 8 Rep. 71, b.).

To lessor and every person to whom the reversion may come.

So if the reservation be to the lessor and to every person to whom the inheritance or reversion of the premises shall appertain during the term, that is likewise good, for the law will distribute it to everyone to whom any limitation of the use shall be made (*ibid.*).

But the most clear and sure way is to reserve rent yearly during the term, and leave the law to make the distribution without an express reservation to any person (*ibid.*).

In *Greenaway* v. *Hart* (14 C. B. 340), lands were limited to such uses as A. should appoint, and in default to the use of B. in trust for A. A. granted a lease by means of his power, reserving rent to himself, his heirs and assigns; the rent and power of re-entry were held well reserved to the person entitled to the legal remainder expectant on the lease. It is there said:—"If a person seised in fee settles his estate on himself for life with remainders to other persons, reserving a leasing power, which he afterwards exercises, reserving rent to himself, his heirs and assigns, those in remainder shall have the rent. So also where a person seised in fee, settles his estate on A. for life with remainders over, and gives him a leasing power, which he exercises, reserving rent during the term to himself, his heirs and assigns, the remainderman shall take it, although neither

heir nor assign of A.; according to some authorities, because the reservation of rent during the term would give it to him, and that which follows shall not prejudice; according to others, because assigns shall be construed assigns of the party creating the power, out of whose estate the power is supposed to emanate."

In *Rogers* v. *Humphreys* (4 A. & E. 299), lands were limited to the use of two mortgagees for 1,000 years, with remainder to A. for life; with remainder to a trustee for 2,000 years, with remainder to such uses as B. should appoint, and in default to B. for life, with remainders over: a power was given to A. to lease for ten years from the date of the deed, or for seven years from her death. A. demised to a lessee for seven years from the date of her death, reserving rent to B. or the person for the time being entitled to the freehold or the inheritance of the premises immediately expectant on the death of A. This lease, being made under a power created by the deed of settlement, was to be deemed contemporaneous with the term of 1,000 years created by the same deed, and was binding on the mortgagees; and those mortgagees, although not entitled to the freehold or inheritance, were held to be the reversioners entitled to the rent reserved by the lease, and to distrain for it; (and see *Tankerville* v. *Wingfield*, 7 Price, 343, n., 3 Bligh, 331, n., 2 Brod. & B. 498, n.).

On the other hand, in *Yellowly* v. *Gower* (11 Ex. 274) the limitations were to the use of trustees for 500 years, and subject thereto to the use of the settlor for life with remainders over, and there was a power reserved to the settlor to lease by deed, either referring or not referring to the power, for twenty-one years in possession and not in reversion, reserving the best rent to be incident to the immediate reversion. The settlor, without referring to his power, but in accordance with it, leased for twelve years, reserving rent to himself, his heirs and assigns. The lease was held bad, one ground being that the rent ought to have been made incident to the immediate reversion, but the lease reserved it to the lessor, his heirs and assigns, and the lessor had no legal estate in possession, and therefore no legal reversion, but simply a legal estate in remainder after the term.

If the power had been recited in the lease, that would have shown that it was meant to be according to the power; (but see *Clere's case*, 6 Rep. 17; and *Robertson* v. *Walker*, 23 W. R. 224).

Lord St. Leonards disapproves of *Yellowly* v. *Gower;* see, too, Davidson (iii. 497 *et seq.*), where it is said that in every case of a lease under a legal power to appoint the use, the question whether the lease is a good exercise of the power is in necessary connection with that, whether the rent is incident to the immediate reversion; whenever the lease is an exercise of the power, the rent follows the reversion, and on the other hand, if the rent is not well annexed to the reversion, the reason must be that the lease is abortive and the remainderman not bound; (and see *Jewel's case*, 5 Rep. 3, and Conveyancing Act, 1881, ss. 10, 11 and 12).

Right to re-enter and to sue on covenants.

27. The right to re-enter for non-payment of rent or non-performance of covenants, and the right to sue on covenants entered into by the lessee, follow the same rule and pass to the persons entitled to the reversion on the same principles (*Hotley* v. *Scott*, 3 Bligh, 331, n.; *Isherwood* v. *Oldknow*, 3 M. & S. 382; *Greenaway* v. *Hart*, 14 C. B. 340; *Basset* v. *Basset*, Amb. 843; *Maundrell* v. *Maundrell*, 10 Ves. at p. 256).

It has been said that a proviso for re-entry on non-payment of rent is, but on breach of any other covenant is not, an usual or customary clause (*Hodgkinson* v. *Crowe*, 10 Ch. 622). The decision in that case was confined to a mining lease, but James, L. J., said, "A clause for re-entry for non-payment of rent is always inserted without opposition by anybody. It has never been disputed by any tenant, because both at law and in equity the lessee can be relieved from the forfeiture by payment of his rent after the period of forfeiture has arrived, just as a mortgagor can redeem his estate, though the time fixed for redemption by the mortgage deed has passed; so that the proviso only operates as a penalty. A clause of re-entry for breach of covenants generally, where, as there are no means of ascertaining the compensation, a court of equity cannot relieve, stands on quite a different footing." This decision was before the Conveyancing Act, 1881; but it has been held that that

section does not affect the principle there stated; (see *Re Anderton and Milner*, 45 Ch. D. 476).

Accordingly, the Settled Land Act, 1882, provides (s. 7, sub-s. 3) only that "every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days." The Settled Estates Act, 1877 (s. 4), requires that every lease granted thereunder shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

Relief against forfeiture under Conv. Act, 1881.

The power of lessors to re-enter and forfeit their lessees' interests is now qualified by the provisions of the Conveyancing Act, 1881, s. 14, which enacts as follow:—

"(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

"(2.) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as the Court, having regard to the proceedings and the conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court, in the circumstances of each case, thinks fit.

"(3.) For the purposes of this section a lease includes an original or derivative underlease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative underlessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative underlessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns.

"(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

"(5.) For the purposes of this section a lease, limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

"(6.) This section does not extend:—

"(i.) To a covenant and condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

"(ii.) In case of a mining lease to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof."

But the lessee cannot apply after the landlord has re-entered (*Rogers* v. *Rice*, (1892) 2 Ch. 170).

And now by the Conveyancing Act, 1892, s. 5, "lease and underlease in s. 14 are extended to an agreement for a lease or underlease where the lessee or underlessee has become entitled to have his lease granted: and underlessee includes any person deriving title from an underlessee."

Agreement not a lease within section.

Before the Act of 1892 an agreement for a lease was held not to be a lease within the meaning of this section (*Swain* v. *Ayres*, 21 Q. B. D. 289), at any rate, unless the lessee would

be entitled to specific performance (*ibid.*; and see *Coatsworth* v. *Johnson*, 55 L. J. Q. B. 220; *Foster* v. *Reeves*, 1892, 2 Q. B. 255). The compensation for breach of covenant which a lessee is liable to pay under the 1st sub-s., does not include the lessor's costs of employing a solicitor and surveyor in respect of the preparation of the notice required by that section (*Skinners' Co.* v. *Knight*, (1891) 2 Q. B. 542; but see, now, Conv. Act, 1892, s. 2); and the notice need not require compensation in money (*Lock* v. *Pearce*, (1892) 2 Ch. 328).

Condition on non-payment of rent.

As to the condition for re-entry on non-payment of rent, Lord St. Leonards (Pow. 822) says that where the power is silent as to time and conditions, a reasonable time and circumstances may be introduced into the clause of re-entry; and although the express mention in the power of a time prevents further time from being allowed, it does not prevent the introduction of a reasonable qualification into a clause of re-entry.

Where power is silent.

Thus, in *Smith* v. *Lord Jersey* (3 Bli. 290), the power was silent as to time and conditions, and it was held that a lease for lives was well granted containing a power of re-entry if the rent should be behind for fifteen days and no sufficient distress could be had on the premises. In *Doe* d. *Lord Shrewsbury* v. *Wilson* (5 B. & Ald. 363), the power required that leases made under it should contain a condition of re-entry on non-payment of rent: the lease reserved rent payable on fixed days, and provided that if the rent should not be paid on those days, the lessor might enter and distrain, and the distress take away and keep until the rent should be satisfied; and also, that if the rent should be unpaid for twenty-eight days after it became due, being lawfully demanded, the lessor might re-enter. The third of five objections taken to the lease was that the landlord could only distrain by the terms of the lease after demand, and was bound to detain the distress until satisfied. The objection was overruled on the ground that the landlord had a power to distrain and to sell the distress independently of the clause: and that the true construction of the clause was, that it was introduced in furtherance, and not in lieu, of the common law and statutory power.

Distress after demand only.

Re-entry postponed for

The fourth objection was twofold: viz., that the right of

re-entry was postponed for twenty-eight days: and only arose after the rent had been lawfully demanded. The period of twenty-eight days was considered reasonable, especially as the same term was contained in a prior lease of the same premises; (and see *Doe* v. *Rutland*, 2 M. & W. 661, where the period was forty-two days). And it was held that the provision as to demanding the rent did not deprive the landlord of the benefit of 4 Geo. II., c. 28, which relieves the landlord from the necessity of making the demand: but Abbott, C. J., thought that it might be otherwise if the lessor expressly covenanted not to re-enter without demand. 28 days and after demand.

In *Tankerville* v. *Wingfield* (7 Price, 343; 3 Bing. 331, n.), the power required the insertion of a clause of re-entry, if the rent should be behind for twenty-one days. The condition in the lease was, if the rent should be behind and unpaid for twenty-one days, and no sufficient distress could be had (3 Bing. 334, *per* Best, J.). Lord Mansfield held this provision as to the distress to be good: saying, "The clause of re-entry [in the power] is short, with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent: it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress." As to this, see 4 Geo. II., c. 28, which provides for the re-entry of landlords in certain events, one being that it be shown that no sufficient distress was to be found on the demised premises countervailing the arrears then due; (but see *Coxe* v. *Day*, 13 East, 118, which, however, Lord St. Leonards, Pow. 822, considers overruled by *Smith* v. *Lord Jersey*, 3 Bl. 290). Where power specifies a period.

A lease containing a condition of re-entry on the rent being twenty days in arrear, when the power mentions twenty-one, is not bad; for it is more beneficial to the remainderman (*Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705).

Nor will a clause restricting re-entry to the case of there being no distress be bad, although the power may specify "no overt distress." The word overt has no legal meaning as attached to a distress (*ibid.* 742). Overt distress.

It has been held, however, that where a power required a condition of re-entry for non-payment of rent and non-perform- Re-entry for breach of covenants.

ance of covenants, a lease with a covenant to repair, and a proviso for re-entry, if the tenant should suffer the premises to be out of repair and should not repair within six months after notice, is bad (*Doe* d. *Lord Egremont* v. *Burrough*, 6 Q. B. 229).

Reservations.

28. If a power require leases to contain the usual *reservations*, &c., the distinction between exceptions and reservations must be remembered. "Note a diversity between an exception, which is ever of part of the thing granted and of a thing *in esse*, for which, *exceptis*, *salvo*, *præter*, and the like, be apt words: and a reservation, which is always of a thing not *in esse*, but newly created or reserved out of the land or tenement demised" (Co. Litt. 47, a).

A privilege of hawking, hunting, fishing, or fowling, is not either a reservation or an exception in point of law (*Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705, 743).

Words of this sort are to be read in their proper legal sense, unless the creator of the power has imposed a different meaning upon them, which is apparent on the face of the instrument, in which case his sense must be adopted: if the words are unexplained and there is sufficient to satisfy them in their legal sense, they must be confined to that meaning (Sug. Pow. 818).

Counterpart.

If the execution of a counterpart be required, the lessee should obtain a memorandum of its execution and delivery to be endorsed on the lease and signed by the lessor: the counterpart need not be contemporaneous with the lease (*Fryer* v. *Coombs*, 11 A. & E. 403), but must be executed within a period which may fairly be considered as comprehended in the transaction (Sug. Pow. 827).

The Settled Land Act, 1882, s. 7, sub-s. 4, provides that—"a counterpart of every lease shall be executed by the lessee, and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence."

Waste.

29. Powers sometimes require that the lessee should not be made dispunishable for waste. Mr. Davidson (iii. 505, n.) says, that under a power in a deed or will to grant leases for twenty-one years at the best rent (saying nothing about waste), it could

not probably be doubted that a lease without impeachment of waste would be unauthorized and void, and consequently the insertion of an express clause for the mere purpose of prohibiting such leases would be superfluous; and he considers it the more eligible and prudent course to omit such a clause in leasing powers (p. 509): the only object in inserting such a clause seems to be to render any attempt to grant a lease without such restriction void on its face (Chance, Pow. 2360): but the existence of such a clause has been said to afford a strong argument for holding that a power to lease lands did not authorize a lease of unopened mines (*Clegg* v. *Rowland*, 2 Eq. 160).

No act can amount to waste unless it be injurious to the inheritance, either, first, by diminishing the value of the estate; or, secondly, by increasing the burdens upon it; or, thirdly, by impairing the evidence of title (*Doe* d. *Grubb* v. *Lord Burlington*, 5 B. & Ad. 507). "I can find no authority for saying that it is ever waste to cultivate land or to cut and dispose of timber according to a prevailing local usage, unless such usage is excluded by the terms of the instrument creating the limited estates which alone give rise to the question" (*per* Lindley, L. J., in *Dashwood* v. *Magniac*, (1891) 3 Ch. at p. 357).

The third head is now of less importance (see *per* Lord Blackburn in *Doherty* v. *Allman*, 3 Ap. Ca. 709, 735); and the erection of buildings by the lessee without the lessor's consent is not waste unless such buildings are an injury to the inheritance (*Jones* v. *Chappell*, 20 Eq. 539). But the erection of cottages for tenants evicted in consequence of the adoption of the plan of campaign is said to be waste (*Brooke* v. *Mernagh*, 23 L. R. Ir. 86; *Brooke* v. *Kavanagh*, *ib.* 97; *Lansdowne* v. *Kehoe*, 29 L. R. Ir. 230). As to waste generally, see *Bowles' Case* (Tudor, L. C. Conv. 37), *Dunn* v. *Bryan* (7 I. R. Eq. 143).

Must the tenant repair?

Mr. Chance (Pow. 2360) says, that in ordinary cases the clause as to waste can scarcely mean, it seems, that the tenant must undertake the repairs. There is, however, some conflict of authority as to this, and as to whether a lessee for years is liable for permissive waste (Co. Litt. 53 a; *Davies* v. *Davies*, 38 Ch. D. at p. 504; and *contra*, *Re Cartwright*, 41 Ch. D. 532, and cases there cited).

In *Doe* d. *Bromley* v. *Bettison* (12 East, 305), the instrument creating the power forbade the insertion of any clause giving authority to the lessee to *commit* waste, or exempting him from punishment for *committing* waste. By the lease granted under the power, the lessor undertook to repair the mansion-house (except windows) and covenanted that, if the roof required repair and he did not repair, the tenant might do so and deduct the charge out of the rent. It was contended that this amounted in fact to an exemption of the lessee from liability for permissive waste: but the Court held the lease good. The question was really as to the quantum or sufficiency of the rent reserved. If the tenant were to keep the premises in repair, the rent would be so much less: if the landlord, so much greater.

In *Nugent* v. *Cuthbert* (Sug. Prop. II. of L. 475), the settlement creating the power required that the lessees should not be made dispunishable for waste by any express words. The Lords held a lease good, which contained a covenant by the lessee to repair, casualties by fire and war excepted. On the other hand, in *Yellowly* v. *Gower* (11 Ex. 274), the power directed that the lessee should not be made dispunishable for waste or exempted from punishment for committing waste; the lessees covenanted to keep part of the demised premises in repair on being found materials, and the lessor covenanted to keep the rest of the premises in repair. The Court held the lease bad; for the lessor's covenant to repair amounted to an implied permission to the lessee not to repair. The case was distinguished from *Doe* d. *Bromley* v. *Bettison*, on the ground that in that case the power prohibited any clause giving power to *commit* waste or exempting from punishment for *committing* waste, but did not forbid permissive waste: in the case before the Court, the term "dispunishable for waste" included both permissive and commissive waste, and was not restrained by the subsequent part of the sentence. Mr. Davidson (iii. 508) considers that "this decision proceeded on a narrow view of the clause as to waste, and though not exactly at variance with the existing authorities, was by no means required by them." It seems, however, that it is contrary to the first principle laid down in *Doe* d. *Grubb* v. *Lord Burlington* (*supra*) that there can be no

waste, unless the value of the estate is diminished: and to the reasoning on which the judgment in *Doe* d. *Bromley* v. *Bettison* proceeded, viz., that it was in reality a question of the quantum of the rent. It has, however, been followed in the recent case of *Davies* v. *Davies* (38 Ch. D. 499), where a lease granted by a tenant for life under the powers of the Settled Estate Acts, "fair wear and tear and damage by tempest excepted," was held bad by Kekewich, J.

No waste if the act be within the terms of the power.

But no act which is within the terms of the power can be punishable as waste. In *Morris* v. *Rhydydefed Colliery Company* (3 H. & N. 473, 885), a settlement contained a power for tenant for life to lease the premises for lives to any persons willing to build thereon: also a power to lease for sixty-three years the coal mines under the lands, "with all such powers, authorities, accommodations, liberties and privileges as shall be necessary, or are usually contained in leases of collieries or mines, &c., so as the lessees be not made dispunishable for waste by any express words." In execution of the power, a lease was granted which empowered the lessee to build such erections, cottages, &c., as should be necessary or proper for the due prosecution of the works: it also empowered the lessee to dig and use stone, &c., which should be required for the collieries or any buildings thereby authorized. The jury found that a power to build cottages was necessary and usual. The Court held—(i.) that the lease was not in excess of the power; (ii.) that the lease was not void on the ground that the power to build and to dig and use stone, &c., was in violation of the provision that the lessees should not be made dispunishable for waste.

So, if a power authorize leases of unopened as well as of open mines, the clause that the lessees shall not be made dispunishable for waste will in a mining lease be rejected as repugnant and void (*Clegg* v. *Rowland*, 2 Eq. 160; *Daly* v. *Beckett*, 24 B. 114).

The clause would also, it seems, be void if the power authorized building leases; and the lessee might pull down old houses in order to erect new ones (*Jones* d. *Cowper* v. *Verney*, Willes, 169).

Acts which do not amount to waste.

In *Doe* d. *Lord Egremont* v. *Stephens* (6 Q. B. 208), where the power provided that the lessee should not be authorized to

commit waste, and the lease contained a stipulation that the lessee should build a new dwelling-house, and might pull down an outhouse and use the materials for so doing, the lease was upheld; (and see *Doe* d. *Hopkinson* v. *Ferrand*, 20 L. J. C. P. 202; S. L. Act, 1882, s. 29).

Usual covenants.

30. The power often requires that the usual, or the usual and reasonable, covenants should be contained in the lease. Even if the power made no such requirement, it seems that a lease containing no covenants by the lessee could not be upheld; for, as a mere agreement for a lease means a lease containing the usual covenants (*Church* v. *Brown*, 15 Ves. 265), so a power to grant leases without more might well be said to mean leases containing the usual covenants; and it would moreover probably be a fraud on the power (Sug. Pow. 827).

If the power authorize ordinary leases at rack-rentals, it seems that the "usual covenants" will be those which are usual as between lessor and lessee; but if the power authorizes beneficial leases, the words "usual" or "usual and reasonable" will be construed with reference to their bearing on the relative rights of the tenant for life and remainderman, and the lease in existence at the time of the creation of the power will be taken as the guide (Davidson, iii. 502, n. (*o*)).

The following have been held to be usual covenants by the lessee in an ordinary lease: to pay rent (*Taylor* v. *Horde*, 1 Burr. 125); to pay taxes, except such as are expressly payable by lessor; to keep premises in repair (*Doe* d. *Dymoke* v. *Withers*, 2 B. & Ad. 903); to allow the lessor to enter and view state of repairs (1 Ha. 181); and by the lessor, for quiet enjoyment (*Hall* v. *City of London Brewery*, 31 L. J. Q. B. 257; and see Davidson, v., Pt. I. 51 *et seq.*, where the cases are collected). Under a power to lease for twenty-one years with the usual covenants, a covenant by the lessor that "in case of fire, the lessor shall rebuild or the lessee may quit," is not usual (*Doe* v. *Sandham*, 1 T. R. 705), nor would equity aid the lessee by reforming the lease (*Medwin* v. *Sandham*, 3 Sw. 685; but see now 12 & 13 Vict. c. 26). A covenant not to assign without license is not usual (*Henderson* v. *Hay*, 3 B. C. C. 632; *Hampshire* v. *Wickens*,

7 Ch. D. 555; *Re Davis & Carey*, 40 Ch. D. 601; *Re Lander & Bagley*, (1892) 3 Ch. 41). It is now provided by the Conveyancing Act, 1892, s. 3, that no fine shall be exacted for any license to assign.

Where the power authorizes leases at the ancient rents, &c., so that every lease shall contain the usual and reasonable covenants, the lease in existence at the time of the creation of the power is usually to be taken as the guide (*Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705; *Doe* v. *Williams*, 11 Q. B. 688).

A lease, if it be not within 12 & 13 Vict. c. 26, and 13 Vict. c. 17, will be invalidated, therefore, not merely by the omission of a proper, but also by the insertion of an improper, covenant, and equity will give no aid; but a mere personal covenant by the tenant for life binding himself only may not avoid the lease (*Doe* d. *Bromley* v. *Bettison*, 12 East, 305).

Building leases.

31. The Settled Land Act, 1882, provides (s. 8) as follows:—

"(1.) Every building lease shall be made partly in consideration of the lessee or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes.

"(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

"(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

"(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

"(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this Act, ought to be

reserved in respect of the whole land for the time being leased; and

"(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed."

And under s. 2, sub-s. 10 (iii.), "building purposes include the erecting and improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith." The 8th section does not apply to a case of past voluntary expenditure by a lessee on buildings comprised in the lease (*Re Chawner*, (1892) 2 Ch. 192).

Apart from the Act, a power to grant building leases is not well executed by a lease which contains no covenant to build, although it contains covenants to amend and repair (*Hallett to Martin*, 24 Ch. D. 624).

The Settled Land Act, 1882, also contains power in certain cases for the tenant for life to grant building leases for longer terms and on other conditions than those above mentioned; and also to convey the land in perpetuity subject to a rent-charge (sect. 10).

And by sect. 9 of the Settled Land Act, 1890, it is enacted as follows:—

"Where, on a grant for building purposes by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rent-charge, the reservation shall operate to create a rent-charge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881, and the rent-charge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it was reserved."

In *Jones* d. *Cowper* v. *Verney* (Willes, 169), a power was given by Act of Parliament to grant building leases, such leases to contain the usual and reasonable covenants; it was held not

well executed by a lease which contained a covenant to keep in repair the premises demised, or such other house as should be built during the term: the Act was held to intend building leases, not leases only for the encouragement of rebuilding; and the Court said that a reasonable covenant in a building lease must certainly be a covenant to build; and it made no difference that the lessee had actually built two houses.

In *Higgins* v. *Rosse* (3 Bligh, 112), where the power was to lease six acres at the best rent, with covenants to build, specific performance of a covenant to renew a lease granted under the power, but which contained no covenant to build, was refused (*semble*) on the ground that the lease was not warranted by the power.

Repairing lease.

32. A repairing lease, in common parlance, means a lease by which the lessee is bound to lay out money in repairing the premises.

Where a lessee covenants well and sufficiently to repair, uphold, support, maintain, amend, and keep, not only the demised premises, but all buildings thereon erected, and to deliver them up well and sufficiently repaired, upheld, supported, amended, and kept together, this is enough to make a lease a good repairing lease (*Easton* v. *Pratt*, 2 H. & C. 676), for a covenant to *keep* in repair binds the tenant to *put* in repair (*Payne* v. *Haine*, 16 M. & W. 541; *Proudfoot* v. *Hart*, 25 Q. B. D. 42).

And in *Truscott* v. *Diamond Rockboring Co.* (20 Ch. D. 251), where the power was to demise all or any of the messuages to any person "who shall improve or repair the same or covenant or agree to improve or repair the same or shall expend such sums of money in improvements thereof respectively as shall be thought adequate for the interests therein respectively," it was held by the Court of Appeal that an agreement by the tenant "to do necessary repairs" was a sufficient compliance with the terms of the power. The case of *Doe* d. *Dymoke* v. *Withers* (2 B. & Ad. 896), where it was held that a power to lease "for the purpose of new building or effectually rebuilding and repairing," was not well executed by a lease containing a covenant to repair only, must be considered as overruled; (see, too, Sug.

Pow. 830). It has been held that a covenant "to rebuild" does not involve any obligation to erect the new buildings in the same manner and in the same style and shape and with the same elevation as the old buildings (*Low* v. *Innes*, 4 D. J. & S. 286).

Who is entitled to damages recovered on breach of covenants.

33. Damages, as a general rule, are the personal estate of the person who recovers them; but there appears to be a distinction between ordinary covenants, such as to repair and the like, and special covenants to rebuild, &c. In a case where lands (then in lease) were devised to trustees for A. for life, with remainder to B. in fee, it was held that damages, recovered by the trustees during the life of the tenant for life in respect of breaches of covenants contained in the lease, belonged to such tenant for life absolutely (*Noble* v. *Cass*, 2 Sim. 343). And there is nothing to be said against this, if the damages recovered be commensurate with the estate of the person injured, as is the case in an action by a tenant for life (*Evelyn* v. *Raddish*, Holt, N. P. 543). But the measure of damages in an action for breach of covenant to repair is the extent to which the marketable value of the reversion is injured (Mayne on Damages, 250; and see *Joyner* v. *Weeks*, (1891) 2 Q. B. 31); and it may well be that there is nothing to show that the plaintiff in such an action is a tenant for life, or the action may be by trustees who would recover in respect of the fee, as was the case in *Noble* v. *Cass*. The whole of the damages, however, was in that case given to the estate of the deceased tenant for life; and the rule is the same with incumbents recovering dilapidations prior to the Act, 34 & 35 Vict. c. 43 (see sect. 37, and *per* Jessel, M. R., in *Wright* v. *Davies*, 1 C. P. D. 638, at p. 650). On the other hand, in *Pole* v. *De la Pole* (2 Dr. & Sm. 420; 34 L. J. Ch. 586), where a tenant for life had obtained 3,000*l.* in consideration of the withdrawal of his opposition to a bill in parliament affecting the settled estate, V.-C. Kindersley held, on the general equity by analogy to the case of a tenant for life of leaseholds, that the 3,000*l.* must be held on the trusts of the settlement; (and cf. *Shrewsbury* v. *Shrewsbury*, 18 Jur. 397).

In *Shannon* v. *Bradstreet* (1 S. & L. at p. 72), Lord Redesdale, speaking of a covenant to lay out 200*l.* in improvements,

says:—"If it were colourable and merely for the purpose of putting money into the pocket of the tenant for life, it would avoid the lease; or if it were not originally intended as a fraud, but were afterwards used fraudulently (as, for example, a covenant to repair, and a sum of money under colour of damages for breach of that covenant recovered by the tenant for life), a court of equity would at least take care that the damages should be laid out on the lands." But this might be solely on the ground of the fraud. If, however, a building lease were granted under a power which required that the tenant should covenant to lay out a sum in building, it would seem contrary to the nature of the power to allow the tenant for life to recover and keep for his own benefit damages for the breach of such a covenant.

Leases by infants.

34. The Conveyancing Act, 1881, s. 41, provides that "Where a person in his own right seised of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."

The Settled Land Act, 1882, enacts as follows:—

"59. Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this Act the land is settled land, and the infant shall be deemed tenant for life thereof.

"60. Where a tenant for life, or a person having the powers of a tenant for life under this Act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this Act, the powers of a tenant for life under this Act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the Court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders.

Act 11 Geo. 4 & 1 Will. 4, c. 65, s. 17.

The 11 Geo. IV. & 1 Will. IV. c. 65, s. 17, provides that the Court of Chancery may authorize leases to be made of land belonging to infants when it is for the benefit of the estate.

It is to be observed that this statute applies only to infants seised or possessed of, or entitled to, any land in fee or in tail,

or to any leasehold lands for an absolute interest. If lands, therefore, were limited to trustees on trust for such of the children of A. as should attain twenty-one, and if but one should attain that age, the whole to such one, with trusts for maintenance, and a gift over, the case would not be within the statute.

In *Re Evans* (2 M. & K. 318), an estate of which A. died seised in fee descended upon A.'s five infant sisters. The father and mother of the infants were both alive, and the estate of the sisters was consequently liable to be divested by the birth of a nearer heir of A. It was held that the infants were not seised in fee within the meaning of the Act.

But in *Re Clark* (1 Ch. 292), where lands were limited in fee, defeasible on certain events happening, the Court held that it had power to authorize leases under the statute, if all persons who could be entitled on any of the events happening were before the Court.

It was held in *Ex parte Legh* (15 Sim. 445), that the Court has no jurisdiction under this Act to authorize leases of lands of which an infant is tenant in remainder. But the contrary was held by Malins, V.-C., in *Re Spencer* (16 W. R. 306), and *Re Letchford* (2 Ch. D. 719).

CHAPTER XVIII.

POWERS OF APPOINTING NEW TRUSTEES.

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1. By s. 31 of the Conveyancing Act, 1881, it is enacted as follows:— Conv. Act, 1881, s. 31.

"(1.) Where a trustee, either original or substituted, and whether appointed by a Court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

"(2.) On an appointment of a new trustee, the number of trustees may be increased.

"(3.) On an appointment of a new trustee, it shall not be

obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

"(4.) On an appointment of a new trustee, any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

"(5.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

"(6.) The provisions of this section, relative to a trustee who is dead, include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

"(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

"(8.) This section applies to trusts created either before or after the commencement of this Act."

Applies to trustees for purposes of Settled Land Acts.

This section is now made applicable to the appointment of new trustees for the purposes of the Settled Land Acts (Settled Land Act, 1890, s. 17): a point which was doubtful before this Act (*Re Wilcock*, 34 Ch. D. 508; *Re Kane*, 21 L. R. Ir. 112).

It appears that the powers given by sub-s. 2 only arise when an appointment is being made. An additional trustee could not be appointed as a single and separate transaction; but if a vacancy is to be filled up, two or more trustees may be appointed to fill such vacancy (*Re Gregson*, 34 Ch. D. 209).

Executors of a deceased trustee do not render themselves liable to costs by declining to exercise the powers given them by this section (*Re Knight*, 26 Ch. D. 82). Executors of deceased trustee not bound to appoint.

If the power is silent as to the events on which it is to be exercised, the Court will read it as meaning on any vacancy however arising, notwithstanding that the settlement is dated before the Act, and that the event which has happened is made by the Act, and not by the settlement, to create the vacancy (*Re Walker and Hughes*, 24 Ch. D. 698). And the fact that the power is silent as to such event, while enumerating others, is not evidence of a contrary intention within sub-s. 7 (*Re Coates to Parsons*, 34 Ch. D. 370). Nor does the necessity for consent to the exercise of an express power, where such consent is no longer possible and the power is therefore no longer exercisable, show such a contrary intention (*Cecil* v. *Langdon*, 28 Ch. D. 1). If, however, the power is given to persons named other than the trustees, and is made exercisable in certain events only, it is submitted that the Act cannot be read as enlarging that power by the addition of other events on which it may be exercised. But in such a case the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, must appoint. For example, if A. has power to appoint new trustees in the place of any trustee who dies, the Act does not enable A. to appoint a new trustee in the place of one who desires to be discharged. In such a case there would be no person nominated for the purpose by the instrument creating the trust, and recourse must be had to the latter part of the first sub-section. In what event statutory power arises.

2. Apart from the Act, surviving trustee has been construed with reference to the trust, not to the lives of the trustees who have disclaimed or retired: "surviving" being in effect equivalent to "continuing to act" (*Sharp* v. *Sharp*, 2 B. & Ald. 405). So in *Cafe* v. *Bent* (5 Ha. 24) the power was given to the survivor of A., B., and C. A. disclaimed and B. died; and it was held that C., although not the survivor in point of life of A., B., and C., could well appoint new trustees, on the "Surviving trustee."

ground that the power was annexed to the office, although the original donees were named.

"Continuing trustee."

In *Stones* v. *Rowton* (17 B. 308), it was held that a power exerciseable by the surviving or continuing trustees or trustee could not be validly exercised by an appointment by the two trustees (both of whom simultaneously retired) of two new trustees in their places. The Master of the Rolls said that in order to uphold such an appointment, it would be necessary to read "continuing" as synonymous with "retiring"; and two deeds were necessary to make an effectual execution; (and see *Nicholson* v. *Smith*, 26 L. J. Ch. 312; *Travis* v. *Illingworth*, 2 Dr. & Sm. 344; *Re Norris*, 27 Ch. D. 333; *Re Coates to Parsons*, 34 Ch. D. 370; and *contrà*, *Re Glenny*, 25 Ch. D. 611).

"Surviving, continuing, or other."

In *Camoys* v. *Best* (19 B. 414), the power was given "to the surviving or continuing or other trustees or trustee," and was well exercised by an appointment by a sole surviving trustee, who desired to be discharged, in place of himself and his deceased co-trustees.

Power in will.

The ordinary power of appointing new trustees in a will may be exercised in the event of the death of a trustee before the testator (*Re Hadley*, 5 De G. & Sm. 67; *Noble* v. *Meymott*, 14 B. 471, overruling *Winter* v. *Rudge*, 15 Sim. 596).

Executors and administrators.

The executors and administrators of the last surviving or continuing trustee must be taken to mean the acting executors and administrators (*Granville* v. *MacNeile*, 7 Ha. 156).

Last surviving includes sole trustee.

Under the Conveyancing Act, the words personal representatives of the last surviving or continuing trustee include the executor of a sole trustee (*Re Shafto*, 29 Ch. D. 247). But the

Sole trustee dying before testator.

Act does not appear to extend to the case of the death of all the trustees or the sole trustee before the testator whose will creates the power (*Re Orde*, 24 Ch. D. 271; *Re Lightbody*, 33 W. R. 452; *Re Ambler*, 59 L. T. 210).

Under sub-s. 6 of the 31st section, the term "continuing trustee" does not include a retiring trustee, unless it is shown that the retiring trustee is competent and willing to act in the

exercise of the powers of the section (*Re Coates to Parsons*, 34 Ch. D. 370; *Re Norris*, 27 Ch. D. 333).

Events in which the power is exerciseable.

3. The power is usually made exerciseable in the event of any one or more of the trustees dying or being abroad, or desiring to be discharged, or refusing or becoming incapable to act. The provision in the Act, "remains out of the United Kingdom for more than twelve months," is new.

Being abroad.

Residence abroad means permanent residence. In *Re Moravian Society* (26 B. 101), trustees were to be disqualified "on departing the United Kingdom, from whatever cause or motive, or under whatsoever circumstances": it was held that a temporary absence was not within the provisions. And in *Re Arbib and Class* (1891, 1 Ch. 601), a testator appointed B., then resident in Australia, one of his executors and trustees, "if and when he shall return to England," and devised his realty to his trustees. B. returned to England eight years after the testator's death, remained for six months, and then returned to Australia without having proved the will or acted in the trusts. It was held that B. had fulfilled the condition by his residence for a substantial period in England, and that the trusteeship and estates had vested in him.

Declining.

A trustee who objected to act with a new trustee, and paid the money into Court, was held to have thereby retired (*Re Williams*, 4 K. & J. 87; but see *Re Landon*, 40 L. J. Ch. 370).

It seems the better opinion that the word "declining" is to be taken in as large a sense as the word "dying," and does not extend merely to the case of a trustee who has never acted (*Travis* v. *Illingworth*, 2 Dr. & Sm. 344; but see *Re Armstrong*, 5 W. R. 448; *Re Woodgate*, *ibid.*). It seems the better opinion that refusing to act is equivalent to desiring to retire (Lewin on Trusts, 9th ed. 739).

Becoming incapable.

Each case must depend on its own circumstances, but, as a general rule, incapacity means personal incapacity (*Re Bignold*, 7 Ch. 223), consequently residence abroad does not constitute incapacity to act (*Withington* v. *Withington*, 16 Sim. 104; *Re Harrison*, 22 L. J. Ch. 69; *O'Reilly* v. *Alderson*, 8 Ha. 101, and *contra*, *Mennard* v. *Welford*, 1 Sm. & G. 426).

Bankruptcy.

Bankruptcy or outlawry does not render a man "incapable" to act (*Re Watts*, 9 Ha. 106), but it renders him "unfit" (*Re Roche*, 2 Dr. & War. 287). A bankrupt, however, who has obtained a first-class certificate, and has since started afresh and has means of his own, is not unfit (*Re Bridgman*, 1 Dr. & Sm. 164). But he is not the less unfit, because his bankruptcy was owing to misfortunes, unless he also has means (*Re Adams*, 12 Ch. D. 634; *Re Barker*, 1 Ch. D. 43).

A bankrupt trustee may be removed under the general jurisdiction of the Court (*Bainbridge* v. *Blair*, 1 B. 495; *Harris* v. *Harris*, 29 B. 107). He might also have been removed by the Court of Chancery, under s. 130 of the Bankruptcy Act of 1849, if the Court thought fit (*Re Bridgman*, 1 Dr. & Sm. 164). And by the Act of 1869, s. 117, it was provided, and by s. 147 of the Act of 1883 it is provided that where a bankrupt is a trustee within the Trustee Act, 1850, the 32nd section of that Act shall have effect so as to authorize the appointment of a new trustee in substitution for the bankrupt (whether voluntarily resigning or not) if it appears expedient, and all provisions of that Act and of any other Act relative thereto shall have effect accordingly. The Act of 1869 authorized "the Court" to appoint; and this was held to mean the Court of Chancery (*Coombes* v. *Brookes*, 12 Eq. 61).

Lunacy.

Lunacy, or unsoundness of mind, renders a trustee incapable to act. In *Re East* (8 Ch. 735), it was provided that if any trustees or trustee should die or become unwilling or incapable to act, the trustees or trustee for the time being, whether continuing or declining to act, might appoint new trustees. One of the trustees became of unsound mind, but was not so found by inquisition, and the other two trustees appointed a new trustee in his place. This appointment was held good.

Lunacy of donee of power.

If the difficulty arises from the lunacy of the donee of the power, his committee may appoint (16 & 17 Vict. c. 70, ss. 136, 137; 53 Vict. c. 5, ss. 128, 129).

Augmenting the number of trustees.

4. If the power clearly require that only one person shall be substituted in the place of another, it must of course be complied with. But under a power in the common form, or

general in its terms, it seems both upon principle and authority, that more than one person may be appointed to fill a vacancy caused by the death, &c., of one of the old trustees (Sug. R. P. Stat. 413; and see Conv. Act, 1881, s. 31, sub-s. 2). In *Ex parte Davis* (2 Y. & C. C. 468), an appointment of four trustees in the room of three was considered invalid. But in *Sands* v. *Nugee* (8 Sim. 130), where a trustee was authorized to name any other person to succeed him and he appointed three, their appointment was upheld; (and see *Meinertzhagen* v. *Davis*, 1 Coll. 335); *Hillman* v. *Westwood* (3 W. R. 41; 24 L. J. Ch. 57).

Under Lord Cranworth's Act, an appointment of two trustees in the place of one has been held valid (*Re Breary*, W. N. 1873, 48). And two trustees of real estate have also been appointed in the place of one under the Trustee Act, 1850 (*Re Tunstall*, 4 De G. & Sm. 421). And the Court is averse to allowing trust funds to stand in the name of a sole trustee (*Grant* v. *Grant*, 34 L. J. Ch. 641). In *Re Brackenbury* (10 Eq. 45), a legacy was bequeathed to A. in trust for a tenant for life and then for reversioners absolutely. On a petition by the reversioners, who were also executors, the Court appointed an additional trustee, but the petitioners were ordered to pay the costs. And the Court has inherent jurisdiction in a cause to appoint new trustees of a will in a case where no trustees were originally appointed by the testator (*Dodkin* v. *Brunt*, 6 Eq. 580; and see Sug. R. P. Stat. 415; and *Re Smurthwaite*, 11 Eq. 251; *Re Davis*, 12 Eq. 214; *Re Moore*, 21 Ch. D. 778).

Diminishing the number of trustees.

5. Although the appointment of a diminished number of trustees appears not to be *ipso facto* void (*Miller* v. *Priddon*, 1 D. M. & G. 335; *Re Fagg*, 19 L. J. Ch. 175; *Re Bathurst*, 2 Sm. & G. 169; *Emmet* v. *Clarke*, 3 Giff. 32; 30 L. J. Ch. 472), the Court will not, without good reason, allow the number of trustees to be diminished, unless the terms of the power authorize it (*Re Ellison*, 2 Jur. N. S. 62). And the Court itself will not appoint a sole trustee, even in cases where no more than one was originally appointed (*D'Adhemar* v. *Bertrand*, 35 B. 19). And in *Lonsdale* v. *Beckett* (4 De G. & Sm. 73), where three trustees of a will were appointed, and one died in the

testator's lifetime, an appointment by the survivor of the other two of a single new trustee in his own place was held invalid, and the Court would not appoint two trustees only without being satisfied that such a course was for the benefit of the *cestuis que trust*.

It will be otherwise if the terms of the power authorize the number of trustees to be increased or diminished; the trustees may exercise such discretion when they are expressly empowered. And in *Re Stokes* (13 Eq. 333), where a testator availed himself of the statutory power, but declared that on any appointment the number of trustees might be augmented or diminished, the Master of the Rolls appointed the continuing trustees to be trustees in the place of themselves, and a trustee who wished to retire; (and see *Peacock* v. *Colling*, 53 L. T. 620; Conveyancing Act, 1881, s. 31, sub-s. 3, *ante*).

Separate sets of trustees. Conv. Act, 1882, s. 5.

6. The Conveyancing Act, 1882, s. 5, enacts as follows:—

"(1) On an appointment of new trustees, a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first mentioned part.

"(2) This section applies to trusts created either before or after the commencement of this Act."

The power of allowing trustees to retire from the trusts of a separate part of the trust property, and of appointing new trustees of the severed portion, was within the jurisdiction of the Court by virtue of s. 32 of the Trustee Act, 1850 (*Re Cotterill*, W. N. 1869, 183; *Re Cunard*, 27 W. R. 52). And, as the fifth section of the Act of 1882 was held not to authorize the appointment of a separate trustee or a separate set of trustees of a particular part of the trust property except on the occasion of the appointment of a new trustee or trustees of the entire trust estate (*Sarile* v. *Couper*, 36 Ch. D. 520; *Re Nesbitt*, 19 L. R. Ir. 509), recourse had still to be had to the Court in every case where it was desired to vest a portion of the estate in separate trustees, and there was no vacancy among the trustees

of the entire trust estate (*Re Moss*, 37 Ch. D. 513; *Re Paine*, 28 Ch. D. 725).

But now by sect. 6 of the Conveyancing Act, 1892, it is enacted:— Conv. Act, 1882, s. 6.

"A separate set of trustees or a separate trustee may be appointed under the fifth section of the Conveyancing Act, 1882, of a part only of the trust property, notwithstanding that no new trustees or trustee are to be appointed of other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; and every appointment already made of a separate set of trustees shall be valid notwithstanding that there was no retiring trustee of other parts of the trust property, and that no new trustees were appointed of such other parts thereof."

7. Where there is a settlement of English property with English trustees, it would be an imprudent and improper exercise of the power to appoint foreigners, or even to appoint persons habitually resident out of England. But where an English woman married an American and the settlement contained a power to invest in American securities, or on real securities in England or America, and the husband and wife went to reside permanently in America, an appointment of three American trustees in the place of the original English trustees was held good (*Meinertzhagen* v. *Davis*, 1 Coll. 335; and see *Re Freeman*, 37 Ch. D. 148; *Re Liddian*, 14 Ch. D. 310; *Re Smith*, 20 W. R. 695; *Re Cunard*, 27 W. R. 52; *Re Long*, 17 W. R. 218; *Re Austen*, 38 L. T. 601). Who may be appointed.

But the Court has refused to authorize the appointment of three foreigners resident in Paris as trustees of a settlement which allowed investments to be made on Government or real securities in France or England (*Re Guibert*, 16 Jur. 852).

8. The principles upon which the Court acts in appointing new trustees are stated in *Re Tempest* (1 Ch. 485). But although it is a safe rule for trustees to make such appointments only as the Court would make, it must not be supposed that appointments made by appointors which the Court would not What appointments are good.

have made are necessarily bad. The appointors must in each case make such an appointment as they *bonâ fide* believe to be proper; and if they do this, the appointment will be valid, although the Court might not have made such an appointment if the application had been to the Court to appoint. Thus, in *Re Norris* (27 Ch. D. 333), the Court refused to appoint a father and son, who were solicitors in partnership, as trustees; but Pearson, J., said: "I am very far from saying, and must not be understood to say, that, if there was a trust which was not being administered by the Court, and the person who had the power of appointing new trustees had *bonâ fide* appointed as trustees a father and his son who were solicitors in partnership, it would be a bad appointment, so as to render any deed executed by the trustees so appointed null and void. I should be very sorry to hold that such an appointment outside the Court would be invalid. If such a case came before me, and I found that the appointment had been made *bonâ fide* outside the Court, I should certainly hold that the trustees were validly appointed."

Appointment of beneficiary.

Again, the Court does not usually appoint persons beneficially interested, or the husbands of such persons (although it has done so, *e. g.*, in *Re Hattatt* (18 W. R. 416), *Re Lightbody* (33 *ib.* 452)), or the tenant for life (*Forster* v. *Abraham*, 17 Eq. 351), but if the donees of the power choose to appoint a beneficiary, the appointment would under ordinary circumstances be perfectly valid (*Tempest* v. *Lord Camoys*, 58 L. T. 221; Lewin, 9th ed., 748, 749).

Of appointor by himself.

It has been held in *Re Skeats* (42 Ch. D. 522), that, where property was settled on trusts in favour of a married woman, her children, appointees, and next of kin, and she and her husband had power to appoint new trustees, an appointment of the husband and another as new trustees was invalid. The decision was rested on the double ground that the power is fiduciary (and a man is not a proper judge of his own fitness), and that the words of the power authorized only the appointment of any "other" person. It would appear to follow from this that the executors of the surviving trustee

cannot appoint themselves to be trustees, although the estate is vested in them on trust. But this is not uncommonly done, and it would unsettle many titles if such appointments were held bad. Probably, the learned judge only meant to decide that the appointment was improper, not that it was null and void. The application was by the retiring trustees for the purpose of ascertaining whether they might properly transfer the trust funds to the new trustees, and it was held that they could not. As to the word "other," it is submitted that its meaning is, other than the person whose place is to be filled, not other than the appointor. But the decision, as reported, certainly creates a difficulty: the safeguard against improper appointments is the liability to costs of the appointors who make them (*Raikes* v. *Raikes*, 32 B. 403).

If appointment void, old trustees can act.

9. If the appointment of new trustees be ineffectual, the old trustees remain and can exercise the powers of the trustees (*Warburton* v. *Sandys*, 14 Sim. 622). But they must exercise their discretion and judgment, and not merely adopt the act of the ineffectually appointed trustee (*Lancashire* v. *Lancashire*, 2 Ph. 657).

Costs of appointments.

The costs of appointing new trustees are as a matter of practice paid out of *corpus*, whether the appointment is made by the Court, or under a power out of Court (Lewin, 9th ed. 753).

Liability of new trustees for notices to their predecessors.

New trustees are not bound to enquire of the retiring trustees whether any notices of incumbrances have been received: and if they distribute the fund without knowledge of an incumbrance of which notice had been given to their predecessors, they will not be liable (*Phipps* v. *Lovegrove*, 16 Eq. 80). But it has been said that they are bound to look into the documents of the trust to see whether their predecessors had notice of any incumbrance (*Hallows* v. *Lloyd*, 39 Ch. D. 686, 691). They are not, however, bound to answer enquiries by a person intending to deal with their *cestui que trust*. Such person has no rights against the trustees, except such as the *cestui que trust* can give him; and it is no part of the trustee's duty to tell his *cestui que trust* what incumbrance he has created, or of which notice has been given.

If the trustee answers such inquiries honestly and without warranting his information to be correct, he is not liable for forgetfulness or mistake (*Low* v. *Bouverie*, (1891) 3 Ch. 82; *Re Wyatt*, *White* v. *Ellis*, (1891) 1 Ch. 188); but he is bound to give proper information as to the investment of the trust estate and the means of verifying such information (*Re Tillott*, (1892) 1 Ch. 86).

As to the liability of trustees who retire under circumstances which warrant a reasonable belief that the trust funds will be in peril in the hands of the new trustees, see *Webster* v. *Le Hunt*, 8 Jur. N. S. 345; *Palariet* v. *Carew*, 32 B. 564; *Sugden* v. *Crossland*, 3 Sm. & G. 192.

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